No. 92-2058

In The

Supreme Court of the United States

October Term, 1993

HAWAIIAN AIRLINES, INC.,

Petitioner,

v.

GRANT T. NORRIS,

Respondent,

and

PAUL J. FINAZZO, HOWARD E. OGDEN and HATSUO HONMA,

Petitioners,

v.

GRANT T. NORRIS,

Respondent.

On Writ Of Certiorari To The Supreme Court For The State Of Hawaii

JOINT APPENDIX

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Date Certiorari Petition Filed: June 25, 1993
Date Certiorari Petition Granted: January 21, 1994

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2. September 20, 1989 – Complaint filed by Norris against Paul J. Finazzo, Howard E. Ogden, and Hatsuo Honma ("the Individual Defendants"), Civil No. 89-2904-09 (1st Circuit Court State of Hawaii).

3. November 1, 1989 – Entry of Order Granting in Part and Denying in Part Defendant Hawaiian Airlines, Inc.'s Motion to Dismiss for Lack of Subject Matter Jurisdiction, Civil No. 87-3894-12 (1st Circuit Court State of Hawaii).

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

GRANT T. NORRIS,	)	CIVIL NO.
Plaintiff,	)	87-3894-12
	)	
vs.	)	COMPLAINT;
HAWAIIAN AIRLINES, INC.,	)	DEMAND FOR
	)	JURY TRIAL;
Defendant.	)	SUMMONS
	)	
	)	(Filed
	)	Dec. 8, 1987)

COMPLAINT

1. Plaintiff GRANT T. NORRIS ("NORRIS") is a resident of the State of California.

2. Defendant HAWAIIAN AIRLINES, INC. ("HAWAIIAN AIRLINES") is a Hawaii corporation whose principal place of business is in Honolulu, Hawaii.

3. The amount of controversy in this case exceeds $10,000.00. All relevant events in this case took place in Honolulu, Hawaii.

COUNT I

4. From February 2, 1987 to August 3, 1987, NORRIS was employed as a mechanic by HAWAIIAN AIRLINES.

5. On or around July 14, 1987, NORRIS was assigned to service one of HAWAIIAN AIRLINES' aircraft.

6. On that date, NORRIS was properly licensed by the Federal Aviation Administration (FAA) to perform the repair work he was assigned.

7. On that date, NORRIS recommended that one of the tires in the main landing gear on the left side of the aircraft be replaced. After reporting his recommendation to the lead mechanic and obtaining the consent of HAWAIIAN AIR's inspector, NORRIS and other mechanics removed the tire assembly.

8. In the process of removing the tire assembly, NORRIS noticed that the tire assembly could be removed only with great difficulty.

9. When the tire assembly finally was removed, NORRIS noticed that the axle sleeve was scarred and grooved, with gouges clearly visible.

10. The applicable manufacturer's specifications for the axle sleeve states that the sleeve is to be removed and replaced if damage to the sleeve exceeds a depth of .005 inch. The actual damage to the axle sleeve far exceeded that amount, substantially increased the likelihood that the landing gear would fail in service, and in fact rendered the aircraft unsafe.

11. When the condition of the axle sleeve was pointed out to HAWAIIAN AIR's Base Maintenance Line Manager, he directed that the gouges on the axle sleeve be sanded down and that the aircraft be returned to service, although the axle sleeve could have been replaced in an procedure taking at most a few hours.

12. In NORRIS's professional judgment, the procedure suggested by the manager did not address the unsafe condition of the landing gear. NORRIS, accordingly, advised the lead mechanic of his opinion and that he did not want any responsibility for performing that work.

13. Personnel other than NORRIS then attempted to perform the procedure suggested by HAWAIIAN AIR's manager but were unable to do so because the axle was too hard to be sanded. The manager then directed that the tire assembly be replaced over the damaged axle sleeve and that the aircraft be returned to service in that condition. Personnel other than NORRIS performed this work, and the aircraft was returned to service. In fact, this damaged and dangerous axle sleeve remained on the aircraft until August 4, 1987, when the FAA took the axle sleeve into its custody.

14. Just before NORRIS's shift ended, the manager demanded that NORRIS sign a record of the work performed in replacing the tire and wheel.

15. Under the applicable Federal Aviation Regulations, such a signature by a licensed mechanic constituted a certification that, as to the work performed by the signer, the aircraft was fit for return to service.

16. NORRIS signed the work record relating to removal of the tire and wheel. NORRIS, however, refused to sign the work record for the balance of the work relating to replacement of the tire and wheel. NORRIS explained to the manager his reasons for refusing to sign the work record.

17. Because NORRIS did not participate in covering up the damaged axle sleeve, the manager's order to sign the work record amounted to an order that he falsify records that are required by the Federal Aviation Act and the Federal Aviation Regulations.

18. Because NORRIS reasonably believed that the covering up of the damaged axle sleeve did not render the aircraft safe for return to service, his supervisor's order to sign the work record amounted to an order that he falsely certify the safety of the aircraft and, thus, risk revocation of his FAA license.

19. Because other mechanics from HAWAIIAN AIRLINES and an inspector from HAWAIIAN AIRLINES could and did sign the work record and approve the return to service of the aircraft. Under the circumstances, the manager's order to sign the work record was completely unnecessary from HAWAIIAN AIRLINES' perspective and only served to threaten and intimidate NORRIS, or other mechanics similarly situated, into falsely certifying aircraft for return to service.

20. NORRIS was then held out of service pending an investigative hearing on a charge of insubordination, and was discharged for insubordination on August 3, 1987.

21. On September 10, 1987, HAWAIIAN AIRLINES's Vice President for Maintenance and Engineering offered to reinstate NORRIS without any back pay for the period since his discharge, and with an explicit warning that "any further instance of failure to perform your duties in a responsible manner" could be punished by discharge. At that point, however, NORRIS had become so distraught about these events that he already had decided to move to California and to change his profession.

22. The foregoing acts constituted a discharge in violation of the public policy expressed in the Federal Aviation Act and the Federal Aviation Regulations, because they had the intent or the effect of allowing unsafe aircraft to carry passengers and of intimidating FAA-licensed mechanics to ignore their obligations to the flying public in order to keep their jobs.

COUNT II

23. NORRIS incorporates by reference the allegations in paragraphs 1-21.

24. After NORRIS punched out on July 15, 1987, he telephoned the FAA to advise them that the aircraft with the damaged axle was unsafe for carrying passengers. After the FAA duty officer told NORRIS that he had no authority to inspect or impound the aircraft at that time, NORRIS went to the office of HAWAIIAN AIRLINES's Assistant Director of Base Maintenance (the "Assistant Director"). NORRIS told the Assistant Director that he had talked to the FAA but had not specifically identified the problem with the aircraft, and that all he wanted was

for the problem to be fixed so passengers' lives would not be enda..gered.

25. The Assistant Director then literally chased NORRIS out of his office after vowing to make certain that NORRIS was fired.

26. The Assistant Director conducted the "investigative hearing" to determine the disciplinary action appropriate for NORRIS for his refusal to sign the work record. The "investigative hearing" was a complete travesty because the Assistant Director, who clearly was predisposed to discharge NORRIS, presided over the hearing and pronounced judgment.

27. The "investigative hearing" was held on Friday, July 31, 1987. On Monday, August 3, 1987, the Assistant Director determined that NORRIS was to be discharged immediately for insubordination in refusing to obey the direct order to sign the work record.

28. HAWAIIAN AIR's acts alleged above violated the Hawaii Whistleblowers' Protection Act, Act 267 of 1987, in that NORRIS was discharged or disciplined because of his report to the FAA.

COUNT III

29. NORRIS incorporates by reference the allegations in paragraphs 1-21 and 24-27.

30. HAWAIIAN AIR's acts alleged above not only caused NORRIS financial loss but effectively destroyed his career in the airline industry.

31. HAWAIIAN AIR's acts alleged above, including the manner in which NORRIS's discharge hearing was conducted by a kangaroo court, the manner in which NORRIS was intimidated under pain of suspension and/or discharge to falsify aircraft maintenance records, and the manner in which NORRIS was threatened by the Assistant Director when the latter had been notified of NORRIS' report to the FAA, caused NORRIS severe emotional distress.

COUNT IV

32. NORRIS incorporates by reference the allegations in paragraphs 1-21, 24-27, and 30-31.

33. HAWAIIAN AIR's acts alleged above constituted outrageous acts taken with a reckless disregard of not only the professional and legal obligations of NORRIS as a FAA-licensed professional mechanic, but also of the public safety and welfare in general. HAWAIIAN AIR should be assessed punitive damages to deter such conduct.

COUNT V

34. NORRIS incorporates by reference the allegations in paragraphs 1-21, 23-27, and 30-31.

35. Throughout NORRIS's period of employment with HAWAIIAN AIRLINES, the terms and conditions of his employment were covered by a collective bargaining agreement (the "Agreement").

36. After NORRIS was discharged, he appealed the discharge decision pursuant to the terms of the Agreement, and sought reinstatement and full back pay.

37. While the appeal was pending, on September 10, 1987, HAWAIIAN AIRLINES's Vice President for Maintenance and Engineering offered to reinstate NORRIS without any back pay for the period since his discharge, and with an explicit warning that "any further instance of failure to perform your duties in a responsible manner" could be punished by discharge.

38. In a letter from HAWAIIAN AIRLINES' vice President for Administration to the vice president of NORRIS's local union dated September 14, 1987, HAWAIIAN AIRLINES took the position that the letter referred to in the previous paragraph terminated the grievance process under the collective bargaining agreement.

39. The foregoing acts of HAWAIIAN AIR constituted a breach of the collective bargaining agreement. Furthermore, in the circumstances, HAWAIIAN AIR repudiated the grievance process in the collective bargaining agreement, entitling NORRIS to bring suit for its breach.

WHEREFORE, Plaintiff demands judgment as follows:

1. General damages in an amount greater than that necessary to confer jurisdiction upon this Court.

2. Special damages in an amount to be proved at trial.

3. Punitive damages in an amount to be proved at trial.

4. Costs of suit and reasonable attorney's fees as allowed by law.

5. Such other and further relief as this Court deems just and proper.

DATED: Honolulu, Hawaii, DEC 8 1987.

/s/ Edward D. Boyle
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

GRANT T. NORRIS, Plaintiff, vs. PAUL J. FINAZZO; HOWARD E. OGDEN; HATSUO HONMA; and DOES 1-50, Defendants.	CIVIL NO. 89-2904-09 COMPLAINT; DEMAND FOR JURY TRIAL; SUMMONS (Filed Sept. 20, 1989)

COMPLAINT

1. Plaintiff GRANT T. NORRIS ("NORRIS") is a resident of the State of California.

2. Defendants PAUL J. FINAZZO and HATSUO HONMA are each residents of Hawaii. Defendant HOWARD E. OGDEN is a resident of California. Defendants DOES 1-50 are other individuals, corporations, or entities presently unknown to Plaintiff despite diligent efforts

already conducted, including examination of discovery in Civil No. 87-3894-12 in this Court.

3. The amount of controversy in this case exceeds $10,000.00. All relevant events in this case took place in Honolulu, Hawaii.

COUNT I

4. From February 2, 1987 to August 3, 1987, NORRIS was employed as a mechanic by Hawaiian Airlines, Inc. ("HAWAIIAN AIR"), a Hawaii corporation.

5. On or around July 14, 1987, NORRIS was assigned to service one of HAWAIIAN AIR'S aircraft.

6. On that date, NORRIS was properly licensed by the Federal Aviation Administration (FAA) to perform the repair work he was assigned.

7. On that date, NORRIS recommended that one of the tires in the main landing gear on the left side of the aircraft be replaced. After reporting his recommendation to the lead mechanic and obtaining the consent of HAWAIIAN AIR's inspector, NORRIS and other mechanics removed the tire assembly.

8. In the process of removing the tire assembly, NORRIS noticed that the tire assembly could be removed only with great difficulty.

9. When the tire assembly finally was removed, NORRIS noticed that the axle sleeve was scarred and grooved, with gouges clearly visible.

10. The applicable manufacturer's specifications for the axle sleeve states that the sleeve is to be removed and

replaced if damage to the sleeve exceeds a depth of .005 inch. The actual damage to the axle sleeve far exceeded that amount, substantially increased the likelihood that the landing gear would fail in service, and in fact rendered the aircraft unsafe.

11. When the condition of the axle sleeve was pointed out to HAWAIIAN AIR's Base Maintenance Line Manager, he directed that the gouges on the axle sleeve be sanded down and that the aircraft be returned to service, although the axle sleeve could have been replaced in an procedure taking at most a few hours.

12. In NORRIS's professional judgment, the procedure suggested by the manager did not address the unsafe condition of the landing gear. NORRIS, accordingly, advised the lead mechanic of his opinion and that he did not want any responsibility for performing that work.

13. Personnel other than NORRIS then attempted to perform the procedure suggested by HAWAIIAN AIR's manager but were unable to do so because the axle was too hard to be sanded. The manager then directed that the tire assembly be replaced over the damaged axle sleeve and that the aircraft be returned to service in that condition. Personnel other than NORRIS performed this work, and the aircraft was returned to service. In fact, this damaged and dangerous axle sleeve remained on the aircraft until August 4, 1987, when the FAA took the axle sleeve into its custody.

14. Just before NORRIS's shift ended, the manager demanded that NORRIS sign a record of the work performed in replacing the tire and wheel.

15. Under the applicable Federal Aviation Regulations, such a signature by a licensed mechanic constituted a certification that, as to the work performed by the signer, the aircraft was fit for return to service.

16. NORRIS refused to sign the work record for the work relating to replacement of the tire and wheel. NORRIS explained to the manager his reasons for refusing to sign the work record.

17. Because NORRIS did not participate in covering up the damaged axle sleeve, the managers order to sign the work record amounted to an order that he falsify records that are required by the Federal Aviation Act and the Federal Aviation Regulations.

18. Because NORRIS reasonably believed that the covering up of the damaged axle sleeve did not render the aircraft safe for return to service, his supervisor's order to sign the work record amounted to an order that he falsely certify the safety of the aircraft and, thus, risk revocation of his FAA license.

19. Other mechanics from HAWAIIAN AIRLINES and an inspector from HAWAIIAN AIRLINES could and did sign the work record and approve the return to service of the aircraft. Under the circumstances, the manager's order to sign the work record was completely unnecessary from HAWAIIAN AIRLINES perspective and only served to threaten and intimidate NORRIS, or other mechanics similarly situated, into falsely certifying aircraft for return to service.

20. NORRIS was then held out of service pending an investigative hearing on a charge of insubordination,

and was discharged for insubordination on August 3, 1987, in a manner that was directed, confirmed, or ratified by FINAZZO, OGDEN, and HONMA.

21. On September 10, 1987, in a letter signed by OGDEN and received by NORRIS on September 21, 1987, HAWAIIAN AIRLINES offered to reinstate NORRIS without any back pay for the period since his discharge, and with an explicit warning that "any further instance of failure to perform your duties in a responsible manner" could be punished by discharge. At that point, however, NORRIS had become so distraught about these events that he already had decided to move to California and to change his profession.

22. The foregoing acts, which were all directed, confirmed, or ratified by FINAZZO, OGDEN, and HONMA, constituted a discharge in violation of the public policy in this State to further the goals expressed in the Federal Aviation Act and the Federal Aviation Regulations. The acts had the intent or the effect of allowing unsafe aircraft to carry passengers and of intimidating FAA-licensed mechanics to ignore their obligations to the flying public in order to keep their jobs.

COUNT II

23. NORRIS incorporates by reference the allegations in paragraphs 1-21.

24. After NORRIS punched out on July 15, 1987, he telephoned the FAA to advise them that the aircraft with the damaged axle was unsafe for carrying passengers. After the FAA duty officer told NORRIS that the officer

had no authority to inspect or impound the aircraft at that time, NORRIS went to the office of HAWAIIAN AIRLINES' Assistant Director of Base Maintenance (the "Assistant Director"). NORRIS told the Assistant Director that he had talked to the FAA but had not specifically identified the problem with the aircraft, and that all he wanted was for the problem to be fixed so passengers' lives would not be endangered.

25. The Assistant Director then literally chased NORRIS out of his office after vowing to make certain that NORRIS was fired.

26. The Assistant Director conducted the investigative hearing to determine the disciplinary action appropriate for NORRIS for his refusal to sign the work record.

27. The "investigative hearing" was held on Friday, July 31, 1987. On Monday, August 3, 1987, the Assistant Director determined that NORRIS was to be discharged immediately for insubordination in refusing to obey the direct order to sign the work record.

28. The acts alleged above, all of which were directed, confirmed, or ratified by FINAZZO, OGDEN, and HONMA, violated public policy as set forth in the Hawaii Whistleblowers' Protection Act, Act 267 of 1987, in that NORRIS was discharged or disciplined because of his report to the FAA.

COUNT III

29. NORRIS incorporates by reference the allegations in paragraphs 1-21 and 24-27.

30. The acts alleged above not only caused NORRIS financial loss but effectively destroyed his career in the airline industry.

31. The intentional acts alleged above, including the manner in which NORRIS was intimidated under pain of suspension and/or discharge to falsify aircraft maintenance records, and the manner in which NORRIS was threatened by the Assistant Director when the latter had been notified of NORRIS report to the FAA, caused NORRIS severe emotional distress. All of these acts were directed, confirmed, or ratified by FINAZZO, OGDEN, and HONMA.

COUNT IV

32. NORRIS incorporates by reference the allegations in paragraphs 1-21, 24-27, and 30-31.

33. The acts alleged above constituted outrageous acts taken with a reckless disregard of not only the professional and legal obligations of NORRIS as an FAA-licensed professional mechanic, but also of the public safety and welfare in general. Defendants should be assessed punitive damages to deter such conduct.

WHEREFORE, Plaintiff demands judgment against Defendants, jointly and severally, as follows:

1. General damages in an amount greater than that necessary to confer jurisdiction upon this Court.

2. Special damages in an amount to be proved at trial.

3. Punitive damages in an amount to be proved at trial.

4. Costs of suit and reasonable attorney's fees as allowed by law.

5. Such other and further relief as this Court deems just and proper.

DATED: Honolulu, Hawaii, September 20, 1989.

/s/ Edward D Boyle
EDWARD deLAPPE BOYLE
THOMAS YAMACHIKA
Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

GRANT T. NORRIS, Plaintiff, vs. HAWAIIAN AIRLINES, INC., Defendant.	)	CIVIL NO. 87-3894-12 AFFIDAVIT OF GRANT T. NORRIS

AFFIDAVIT OF GRANT T. NORRIS

STATE OF HAWAII	)	SS:
CITY AND COUNTY OF HONOLULU	)	

GRANT T. NORRIS, being first duly sworn, states as follows:

1. I am the plaintiff in this action. I am making this affidavit upon person knowledge except where stated otherwise.

2. I have been, and still am, a licensed aircraft mechanic with an Airframe and Powerplant ("A&P") rating. One of the inscriptions on the back of my license reads:

REPAIRMAN OPERATIONAL RESTRICTION

The holder hereof shall not perform or approve alterations, repairs or inspections of aircraft except in accordance with the applicable airworthiness requirements of the Federal Aviation Regulations, or such method, techniques

and practices found acceptable to the Administrator.

3. From February 2, 1987 to August 3, 1987, I was employed as a mechanic be defendant Hawaiian Airlines, Inc. ("HAL").

4. In July 1987, my shift typically would start at 9 p.m. at night and end at 5:30 a.m. the next morning.

5. At approximately 3:30 a.m. on July 15, 1987, I was working on HAL's Aircraft 70 (Serial No. N709HA). I was doing a routine preflight inspection on that aircraft, and I noticed that the left No. 2 tire was worn and needed to be changed. I advised the lead mechanic who, after consulting with a HAL inspector, authorized the tire change.

6. When I and other mechanics removed the tire, we discovered that the wheel bearing was frozen or stuck onto the axle sleeve. We had difficulty removing the bearing from the axle sleeve, and we approached the lead mechanic and the inspector for their advice. We continued to be unsuccessful, and at about 4:35 a.m. the Base Maintenance Line Manager personally came over to supervise.

7. We eventually removed the bearing at about 4:45 a.m. I, and the others present, noticed that the axle sleeve was scarred and grooved, with gouges and burn marks clearly visible.

8. An axle sleeve, sometimes called an axle spacer is an aircraft part that fits snugly around the axle. It is designed to protect the axle from damage. An axle sleeve normally has an external surface that is so highly polished as to be mirror-like. I know that the reason why the

surface is so polished is so that inner race of the wheel bearing that is put on over it will spin freely around the axle sleeve. If the axle sleeve surface is uneven or damaged, the inner bearing race will bind to the axle sleeve, forcing the bearing itself to absorb all of the stress incident to take off or landing.

9. At the time I discovered the damage on July 15, 1987, I did not remember exactly what was the acceptable tolerance for damage specified in the manufacturer's manual. I knew, however, that the tolerance could not have been more than at most a few hundredths of an inch and the damage that I saw clearly exceeded that. I later found out from the FAA that the acceptable tolerance for damage is 0.005 inch.

10. I know that when an aircraft lands, the landing gear wheels will speed up from rest to approximately 150 miles per hour in a fraction of a second. The heat generated by this sudden acceleration, if absorbed by the bearing alone, could be enough to melt the bearing. If that happened, the landing gear could fail. I believed, from the scarring and burn marks on the axle sleeve, that someone had removed what must have been a completely destroyed bearing from this axle sleeve and the installed another bearing over the same sleeve.

11. At that time, there was no doubt in my mind that the part was unsafe and needed to be changed. The mechanic who was working with me on that shift agreed, as did other mechanics who were also present.

12. HAL's Base Maintenance Line Manager (whom I will refer to as the "supervisor") saw the condition of this axle sleeve. The supervisor is responsible for maintaining

the published flight schedules. The supervisor had told us that Aircraft 70 was due back on line at 6:30 a.m., which meant that the aircraft had to be out of the barn by 6:00 a.m.

13. The supervisor directed us to hand-sand the rough edges of the axle sleeve and to put a new bearing and tire on over it. At that point, I told the lead mechanic that I did not want to be responsible for reinstalling the tire.

14. Aircraft No. 70 was returned to service and in fact did carry passengers that morning.

15. At about 5:15 a.m., the supervisor approached me and asked me to sign the maintenance record for installation of the No. 2 tire. I told the supervisor that if he could show me in the maintenance manual where it said that the axle spacer was in a satisfactory condition then I would sign. I also said that I, after checking with the lead mechanic, did not actually perform the tire installation but only assisted.

16. The supervisor did not check the manual or allow me to check the manual, but told me that if I did not sign I would be suspended. I said I would not sign. I was not offered the option of signing off on the tire removal only. The supervisor suspended me on the spot, pending a termination hearing.

17. Later that morning, as soon as I got home, I telephoned the FAA to tell them that there was a problem with Aircraft 70, although I did not say what the problem was.

18. In the late morning or early afternoon of July 15, 1987, after the supervisor had gone off shift, I went back to pick up my tools and then went to the office of HAL's Assistant Director of Base Maintenance (the "Assistant Director"). While I was waiting for him, I had started to leaf through the maintenance manual, but I did not finish because the Assistant Director arrived and stopped me. The Assistant Director told me that he had heard of the events that had happened earlier that morning. I told him that I had called the FAA.

19. The Assistant Director had written a letter formally advising me that I was charged with insubordination. The Assistant Director did not let me see the maintenance manual. In fact, he literally chased me from his office, saying that whatever I or the Union said, I was "gone."

20. A true and correct copy of the letter I received, along with notations of mine requesting additional time before the hearing and the Assistant Director's acceptance of this request, is attached as Exhibit "1".

21. My termination hearing was held on July 31, 1987. That was a Friday. The decision to discharge me for insubordination was issued the following Monday, August 3, 1987.

22. A true and correct copy of the termination decision is attached as Exhibit "2." The decision indicates that copy of it was sent to HAL's Vice President for Maintenance and Engineering, Howard Ogden.

23. On September 21, 1987, I received a letter from HAL's Vice President for Maintenance and Engineering.

That letter, a true copy of which is attached as Exhibit "3", offered to reinstate me without any back pay for the period since my firing, with an explicit warning that "any further instance of failure to perform your duties in a responsible manner" could result in my getting fired again.

24. When I had gotten the letter, however, I was in California. I was preparing to attend nursing school because I figured that my career in the airline industry had ended.

25. The attached Exhibit "5" is a true and correct copy of the page of my collective bargaining agreement containing Article XV, Paragraph H.

Further affiant sayeth naught.

/s/ Grant T. Norris
GRANT T. NORRIS

Subscribed and sworn to before me
this 5th day of January, 1988.

/s/ Monica G. L. illegible
Notary Public, State of Hawaii

My commission expires: 9/29/89

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

In the Matter of the Investigation of Hawaiian Airlines, Inc.

Report of Formal Investigation Conducted Under Part 13 of the Federal Aviation Regulations Relating to the Inspection and Removal of the Main Landing Gear Wheel Assemblies on Civil Aircraft N689HA and N699HA on September 18 – 20, 1987.

/s/ Frederick C. Woodruff Feb 10 1989
Frederick C. Woodruff Date
Presiding Officer

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I. INTRODUCTION

This report of Formal Investigation consists of four separate parts. Part I is the Introduction; Part II is a Statement of the Investigation; Part III is a statement of Facts; and Part IV is a discussion of issues raised in the order of investigation.

This Introduction is intended to accomplish two purposes. First, it sets forth the underlying philosophy used by me in preparing this report. In general, the Report is intended to constitute as complete a discussion of the information obtained during the investigation as is possible. For this reason, where there is conflicting evidence on a particular point, I have attempted to summarize both sides. In some portions of the Report, I have made certain determinations in the form of findings of fact. This is particularly so in Part III and in some portions of Part IV. However, where the ultimate determination rests on a finding of credibility, I have not made ultimate conclusions but rather have discussed and analyzed all of the evidence. In certain areas, I have also found that further inquiry either in the form of additional expert analysis of evidence developed in this investigation or agency consideration of evidence in other related cases

might assist in clarifying these issues. This additional review or evidence is considered to be necessarily beyond the scope of this investigation. For this reason, I have described the additional investigation that could be conducted and left the ultimate conclusions to be made after it is determined whether such additional investigation should or can be accomplished.

The Introduction also lists the various parts of the Report and describes the content and purpose of each part. In doing this, I have attempted to indicate what is covered in each individual section. Part II of the report contains a narrative of how the investigation was conducted – it covers the methods utilized, the rulings made by me and the rights afforded to Hawaiian Airlines (hereafter referred to as HAL). Part III is a general narrative of the facts surrounding the incident which is the subject of this investigation. The findings of facts set forth in this part are considered by me to be either established by uncontroverted evidence or by a preponderance of reliable and conclusive evidence. Part IV is analysis of the several specific issues which I was directed to investigate in this case. For the reasons covered above, my approach in this part is to discuss and analyze the evidence adduced during the investigation and to describe certain additional investigation or expert analysis which is considered beyond the scope of this investigation and which would assist in a final decision. With the exception of the first portion of Part IV A, I have deferred making ultimate determinations. The report also discusses certain legal precedent.

Various attachments are a part of this report and are specifically described in the body of the report. These

generally consist of a listing of specific facts in greater detail or actual evidence or correspondence generated as a part of the investigation. The attachments have been physically included as a part of this report with the exception of Attachment 4 which consists of the depositions. Because of their volume, the Depositions have not been physically reproduced and attached to the report itself. HAL has a copy of these depositions and the originals are on file at the Office of the Assistance Chief Counsel for the Western-Pacific Region. Also, the records referred to in Attachment 2 are maintained at the same office.

II. CONDUCT OF THE INVESTIGATION

This investigation was initiated pursuant to an Order of Investigation issued by DeWitte T. Lawson, Jr., Regional Counsel, Federal Aviation Administration (FAA), Western-Pacific Region on April 13, 1988, a copy of which is attached as Attachment 1 to this report. This Order of Investigation named the undersigned as investigating officer and ordered me to investigate the circumstances surrounding the inspection and replacement during the period from September 18 through 20, 1987, of the main landing gear axle spacers (hereafter referred to as sleeves) on certain Douglas DC-9-51 aircraft owned and operated by HAL. The undersigned was specifically charged with ascertaining the condition of the sleeves that were removed from the aircraft and the circumstances under which these removed sleeves were purportedly either misplaced or lost by HAL. The investigation was also to cover the issue of whether HAL or any individuals may have violated Section 43.13 or

121.153(a)(2) of the Federal Aviation Regulations or any other Federal regulation or statute.

As charged by the Order of Investigation, I conducted the investigation in accordance with the procedures set forth in Subpart F of Part 13 of the Federal Aviation Regulations. HAL was named as a party to the investigation. Throughout the investigation, HAL's counsel of record was Jonathan B. Hill, Esquire.

Pursuant to the Order, a subpoena was issued on April 18, 1988, to HAL requiring them to produce all HAL Forms 142, 46 and 1128 for Aircraft N689HA and N699HA (hereinafter referred to as aircraft 68 and 69) for the period from March 1, 1987 through September 30, 1987. All of these forms were promptly provided by HAL and were reviewed with the assistance of personnel from the FAA Honolulu Flight Standards District Office. HAL Forms 46 and 1128 are maintenance forms and were used as a basis for determining the identity of HAL maintenance personnel who were connected with the removal of inspection of the sleeves and the type of maintenance performed on the aircraft. The HAL Forms 142 are flight records which contained similar information. In addition, a subpoena was issued on to HAL requiring them to produce all HAL forms 71 (Captains Flight Report) for aircraft 68 and 69 for the period of July 1, 1987 to September 17, 1987. Attachment 2 contains data concerning the number of flights aircraft 68 and 69 were operated on during the period covered by the subpoenaed Form 71 records. In addition, I was initially supplied with certain witness statements prepared by Mr. Thomas Murata and other notes in the possession of the Honolulu Flight Standards District Office.

In conducting the investigation, I held a total of 26 depositions of various witnesses. The first 13 depositions were taken in Honolulu, Hawaii, on May 3 and 4, 1988. These depositions were taken of all HAL personnel who were identified in either HAL Forms 46 or 1128 or in Mr. Murata's witness statement as having some involvement or contact with the inspection or removal of the sleeves in question during the period from September 18-20, 1987. However, depositions were not taken of certain HAL personnel who were involved in existing related enforcement cases involving Civil Aircraft N709HA (hereinafter referred to as aircraft 70) due to my concern over prejudicing the rights of those individuals or affecting the outcome of those cases. A second group of 10 depositions were taken on August 22 through 24, 1988, In Honolulu, Hawaii. The persons deposed in this second group included three FAA employees from the Honolulu Flight Standards District Office (FSDO), additional HAL employees whose involvement was identified during the first depositions and those individuals who were not previously deposed because of their involvement in the cases concerning aircraft 70. As to the latter, I concluded that their rights could be properly protected by not permitting any questions relating to the merit or substance of the incident involving aircraft 70 and this restriction was adhered to throughout the depositions. One additional deposition was taken of a Mr. Justin Culahara, an HAL employee who was involved in the aircraft 70 accident. Mr. Culahara was out of Hawaii for compelling personal reasons at the time of the other depositions and he was deposed on his return to Honolulu on September 1, 1988, while the investigating officer was still in Hawaii on

previously scheduled personal leave. The last two depositions were taken of Albert P. Wells, a retired HAL senior Vice President residing in Florida, and John F. Daniel, a former HAL mechanic residing in Kentucky. Mr. Wells was deposed in Washington, D.C. on September 12, 1988, and Mr. Daniel was deposed in Eddyville, Kentucky on September 16, 1988. Attachment 3 contains a list of the names of the witnesses deposed in this investigation as well as the dates and places of the depositions and description of the witnesses' position with HAL or the FAA.

HAL was represented by Mr. Hill in all of the depositions except that of Mr. Culahara, for which Stephen R. Thompkins, Esquire represented the airline. In addition, with the exception of Mr. Sealy and Mr. Culahara, Mr. Hill represented all of the HAL employees as to those two depositions, Mr. Culahara was represented by John M. Cregor, Esquire and Mr. Sealy was represented by Mr. Samson Poomaihealani of the International Association of Mechanists and Aerospace Workers. At all of the depositions, the various counsels were afforded full opportunity to examine witnesses and to raise objections to questions posed by the investigating officer or other counsel. Those HAL Forms 46, 142 and 1128 and witness statements and notes which were considered relevant by either myself or other counsel were formally introduced and attached as exhibits to the individual depositions. For this reason, I consider that it would be repetitive and serve no purpose to attach the individual exhibits separately to this report. Rather, any references to these documents will consist of references to the specific exhibits contained in the depositions. For administrative purposes, the depositions are

considered to constitute Attachment 4 to this report. In addition, the various correspondence between the investigating officer and HAL are attached as Attachment 5 to this report.

Throughout the conduct of the investigation, I was required to rule on various objections at the depositions as well as on several motions or requests by HAL. In making these rulings, I based my decisions on the provisions of Part 13 of the Federal Aviation Regulations. To achieve as complete a record as is possible. I approved all of the requests for witnesses by HAL after determining that it was likely that each witness had relevant information to give. Further, as discussed earlier, existing documents in my possession were released by me to HAL by my letters of April 27, 1988 and May 25, 1988, and other inquiries for information were answered by me (see my letter of June 13, 1988). I would like to note for the record that HAL promptly complied with all subpoenas and that Mr. Hill and Mr. Howard Ogden were most cooperative in complying with all informal requests and in scheduling the testimony of the numerous HAL employees. I was assisted by Mr. Herber Aiwohi from the Honolulu FSDO who acted as my technical advisor during the depositions. Finally, by my Order dated May 23, 1988, I closed the investigation proceedings to the public on the basis that premature disclosure of the information during the pendency of the investigation could adversely affect HAL and the various witnesses especially since the record would be incomplete during an extended period of time.

III. FINDINGS OF FACT

Background

In September 1987, HAL operated five Douglas DC-9-51 aircraft which included aircraft 68, 69, and 70. the main landing gear assembly of the Douglas DC-9-51 aircraft includes the following components: the struts, the shock strut, the axle spacers (sleeves), the wheels, the brakes, the tires and the hydraulic lines. (Ogden TR at pp. 37, 38). The main landing gear spacer (sleeve) is a hollow metal cylinder which covers the axle at the location of the axle bearings. (Nitta TR at pp. 11, 12; Nishibun TR at p. 33). The bearings actually ride on the sleeves which act to protect the axle itself by keeping a frozen bearing from harming the axle. (Ogden TR at pp. 31, 32).

The Douglas aircraft Maintenance Manual (Ogden Deposition FAA Exhibit 5) on page 206 in paragraph 4a specifies the inspection/check for the main gear axle sleeves. The manual calls for a check for nicks, gouges or galling of the sleeves. The inspection/check would be a visual inspection of the sleeve. (Nitta Tr at pp. 12, 13; Ogden TR at p. 23). The Douglas aircraft Maintenance Manual specifically sets forth in paragraph 4a(2) a damage tolerance for nicks, gouges or galling as to not exceed .005 inch maximum depth in an area exceeding 25%. (Sealy TR at p. 21; Ogden TR at pp. 28, 29, 30). If the visual inspection indicated damage which might exceed this tolerance, then a more accurate measurement with a micrometer or more sophisticated test, such as dye penetrant, would normally be accomplished. (Nitta Tr at p. 13; Ogden Tr at p. 25). The presence of scratches or gouges on a sleeve beyond tolerance could result in a bearing

freezing, causing a wheel failure where the wheel would literally come apart. (Ogden TR at p. 33).

In August 1987, the main landing gear sleeves on aircraft 70 was the subject of an FAA investigation and subsequent enforcement action. While not related to this action, the management of HAL were well aware of the FAA allegation that the main landing gear sleeve on that aircraft was not in compliance with airworthiness requirements and that the FAA had requested to inspect that sleeve. (Ogden TR at p. 22). As discussed in greater detail below, the FAA request to inspect aircraft 68 and 69 arose in connection with the processing of one of the individual enforcement cases concerning aircraft 70.

FAA Letter of September 18, 1987

On September 15, 1987, Thomas Sealy had a meeting with officials from the FAA Flight Standards District Office. The meeting was originally set up for Mr. Sealy to discuss the pending enforcement case against him.[1] (Beckner Tr at p. 23). Present at the meeting were Peter Beckner, Manager, Honolulu FSDO; Richard Teixeira, Airworthiness Unit Supervisor, Honolulu FSDO, and Thomas Murata, Aviation Safety Inspector, Honolulu FSDO. (Beckner TR at pp. 4, 23; Teixeira TR at pp. 4, 9; Murata Tr at p. 4).

During the meeting, Mr. Sealy presented three handwritten notes which he indicated were written by other

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[1] Mr. Sealy was employed as an aircraft mechanic for HAL and was one of the individuals charged with violations of the Federal Aviation Regulations in connection with aircraft 70.

HAL mechanics.[2] These notes are identified as HAL Exhibits 1 and 2 in the Beckner and Sealy depositions. The documents indicated that a problem existed with the sleeves on the two aircraft and that specifically the number two axle sleeve on aircraft 68 was severely worn. Mr. Teixeira and Mr. Beckner reviewed the three documents to ascertain the reliability of the information which was anonymous. (Teixeira TR at p. 10). After reviewing the information, Mr. Beckner and Mr. Teixeira decided that the notes constituted a reason to suspect that there may be an airworthiness problem on these two aircraft. (Beckner TR at p. 9). Based on this, it was decided to issue a letter to HAL requesting a re-examination or reinspection under Section 609 of the Federal Aviation Act of 1958. (Beckner TR at p. 7). This letter was drafted by Mr. Beckner and Mr. Teixeira and was signed by Mr. Beckner for Mr. Donald Lowry.[3] (Teixeira TR at p. 7; Beckner TR at p. 8). The "609 reexamination letter" was dated and signed on September 18, 1987 and is FAA Exhibit 2 in the

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[2] In his deposition, Mr. Sealy denied that he gave the handwritten notes, identified in his deposition as HAL Exhibit 2, to Mr. Beckner and Mr. Teixeira at this meeting on September 15, 1987 (Sealy TR at p. 51) and could not recall if he gave HAL Exhibit 1 to the FAA (Sealy TR at p. 45). Mr. Sealy also testified that he did not discuss aircraft 68 or 69 at the meeting with the FAA officials (Sealy TR at p. 50). However, it is considered that the testimony of the three FAA witnesses is credible on this point and that the three documents were given by Mr. Sealy on that date.

[3] Mr. Lowry was the FAA principal maintenance inspector for HAL. During the period September 17-18, 1987, Mr. Lowry was not on the island and did not participate (Beckner TR at p. 8; Teixeira TR at p. 8). Mr. Lowry has since passed away.

Beckner and Teixeira Depositions. The letter indicated that investigation gave reason to believe that the airworthiness of aircraft 68 and 69 was in question and that it was necessary for HAL to make those two aircraft available for reinspection in the presence of two inspectors from the Honolulu FSDO. The letter further requested that the reinspection be conducted on Monday, September 21, 1987, and that HAL should contact the FSDO to confirm the date and establish a convenient time. The letter was hand-carried to HAL on the afternoon of September 18, 1987, which was a Friday. (Beckner TR at p. 10).

HAL's Decision To Inspect And Remove the Sleeves During September 18 – 20, 1987

The "609 reexamination letter" was received by Mr. Paul Finazzo, who was the President and Chief Executive Officer of HAL, at approximately 3 p.m. on September 18, 1987. (Finazzo TR at pp. 4, 8). Mr. Finazzo called Mr. Albert Wells who was HAL's Senior Vice President for Operation and read the letter to him. (Finazzo TR at p. 9; Wells TR at pp. 10,13). Mr. Finazzo gave Mr. Wells an order to take immediate action to ensure that the aircraft were safe. (Finazzo TR at p. 10; Wells TR at p. 14)[4]. Mr. Finazzo testified that he ordered the action to be taken immediately because he was very uneasy about allowing potentially unsafe aircraft to operate over the weekend

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[4] Mr. Finazzo did not give Mr. Wells any specific instructions as to what was to be done. Rather, he told Mr. Wells to take whatever action was necessary to make the aircraft airworthy (Wells TR at p. 15; Finazzo TR at p. 12).

and was concerned about the FAA trying to entrap HAL. (Finazzo TR at pp. 9,10).

After talking to Mr. Finazzo, Mr. Wells telephoned Mr. Howard Ogden, the Vice-President of Maintenance and Engineering for HAL, who was in California at the time. (Wells TR at p. 19; Ogden TR at pp. 4,6). Mr. Wells read the "609 reexamination letter" to Mr. Ogden and they discussed the contents of the letter. (Ogden TR at pp. 7, 8). Both Mr. Ogden and Mr. Wells concluded that the FAA was interested in inspecting the axle sleeves although that was not specifically mentioned in the letter. (Wells TR at pp. 18, 19). They also discussed the scheduling of the inspection of the sleeves to begin that night, particularly in view of Mr. Finazzo's order to Mr. Wells. (Wells TR at p. 19; Odgen TR at p. 8). Both witnesses indicated their concern over the delivery of the FAA letter on Friday afternoon with the inspection not to be accomplished until Monday. (Wells TR at p. 19; Ogden TR at pp. 7, 8). Mr. Ogden concurred in Mr. Wells' decision to replace all of the sleeves on aircraft 68 and 69 as quickly as possible regardless of the conditions of the sleeves. (Wells TR at pp. 19, 20; Ogden TR at pp. 9, 10). There was no discussion during their conversation of contacting the FAA to advise them of the new schedule for removal of the sleeves. (Ogden TR at p. 11). Mr. Wells testified that he believed he attempted to call the FAA that afternoon but was unable to reach any one. (Wells TR at pp. 19, 27, 28)[5]. Other than this possible one call by Mr. Wells, HAL

[5] Mr. Wells testified that he believed that he called the FAA. He indicated he was not positive but pretty sure he did because that would have been his immediate reaction. He did concede that it was possible he did not call because of the lateness of the hour (Wells TR at pp. 27, 28).

management personnel made no attempt to advise the FAA that the sleeves were being removed commencing Friday evening.

Mr. Wells then contacted Mr. Bonardel, the Director of Quality Assurance for HAL, and instructed him to issue a Fleet Campaign ordering that the work on the sleeves be commenced. (Wells TR at p. 29). Mr. Wells testified that he instructed Quality Assurance to issue the Fleet Campaign to replace all sleeves on aircraft 68 and 69 (Wells TR at p. 29) regardless of whether they showed wear or not, and this is reflected in HAL's letter to the FAA dated September 22, 1987. (Beckner Deposition HAL Exhibit 3; Wells Deposition FAA Exhibit 3). Quality Assurance thereafter issued HAL Forms 1128 for aircraft 68 and 69. (Honma Deposition FAA Exhibits 2 and 3; Wells Deposition FAA Exhibits 4 and 5)[6]. The HAL-1128 Forms are standard HAL forms which are used to schedule and assign certain work tasks and to indicate the work that was performed and identify the HAL employees performing the work. (Katano TR at pp. 18, 19; Kagawa TR at pp. 15, 16; Mihara TR at p. 15). HAL-1128 Forms were issued for both aircraft 68 and 69 and for each axle the form instructed the employee to remove the main landing gear wheel and tire assembly, inspect the axle sleeves and replace if necessary. Thus, there is a marked discrepancy between Mr. Wells' testimony as to

[6] A Fleet Campaign is a maintenance work project in which specific maintenance is performed on all the carriers' aircraft or on all of a specific type of aircraft.

the instructions he gave to Quality Assurance (replace all the sleeves on aircraft 68 and 69) and the instructions contained on the HAL-1128 Forms (replace the sleeves if necessary). While conceding that the HAL-1128 Forms don't require the removal of all the sleeves, Mr. Wells testified that it was his belief that the HAL employees knew that he wanted all the sleeves replaced. (Wells TR at p. 32). However, a review of the testimony of the various employees who worked on the two aircraft indicates that there was no general understanding that all the sleeves on the two aircraft were to be removed regardless of their condition[7].

Inspection And Removal of The Sleeves

The work on the sleeves commenced on the evening of September 18, 1987. It appears that the work was initially assigned to the work crew of Mr. Gary Nitta. This work crew consisted of the following: Gary Nitta – line maintenance manager; Alton Nishibun – lead mechanic;

[7] Mr. Gary Nitta testified that it was his understanding that his crew was to inspect the sleeves and "replace any that were questionable" (Nitta TR at p. 16). Mr. Alton Nichibun, Mr. David Sonstein and Mr. John Daniel all understood that they were to remove the wheel and inspect the sleeve and if there was any damage to get a HAL inspector who would determine if the sleeve was acceptable. If the sleeve was determined not acceptable, then it was to be removed (Nishibun TR at p. 16; Sonstein TR at p. 12; Daniel TR at pp. 20, 24). Mr. Tracy Katano and Mr. Oliver Pohina (HAL inspectors) testified that they understood that they were to inspect the sleeves and replace them if there was any damage (Katano TR at p. 18; Pohina TR at p. 27). Mr. Douglas Kam testified that his understanding of the phrase "if necessary" in the HAL-1128 Form was to replace the sleeve if it was out of tolerance (Kam TR at pp. 16, 17).

John Daniel, David Sonstein, Thomas Sealy, Eric Nishijima and Garrick Shimabukuro – line maintenance mechanics. (Nitta TR at p. 10; Nishibun TR at pp. 11, 13, 6; Sonstein TR at pp. 7, 8, 9, 10; Nishijima TR at pp. 8, 9; Sealy TR at pp. 11, 13, 14; Daniel TR at pp. 10, 13, 14; Shimabukuro TR at p. 10). It appears that they began the work by first pulling the wheels and then visually looking at the sleeves. (Daniel TR at pp. 39, 40; Nishibun TR at p. 20). Damage was noted to at lest three of the four sleeves on aircraft 68. (Nishibun TR at p. 21; Daniel TR at p. 45; Sealy TR at p. 43; Nishibun Deposition FAA Exhibit 2). After the removal and inspection by Mr. Nitta's crew, the sleeves were inspected by a HAL inspector. (Sealy TR at p. 17; Sonstein TR at p. 11; Daniel TR at p. 21; Katano TR at p. 26). The records as reinforced by the testimony indicate that both aircraft 68 and 69 were worked on the first night. (Nishibun FAA Exhibit 2 and 3; Nishibun TR at pp. 19, 29, 30). The records and the testimony indicate that the work was not completed the first night but rather continued over the whole weekend. (Nishibun TR at pp. 68, 69; Daniel TR at pp. 36, 59; Sealy TR at p. 35; Nishijima TR at p. 20).

During its shift, Mr. Nitta's crew commenced removal of at least two sleeves on aircraft 69 and two sleeves on aircraft 68. (Nishibun FAA Exhibit 2 and 3). The work was apparently accomplished primarily by Mr. Daniel and Mr. Sealy with Mr. Sonstein and Mr. Nishijima and Mr. Shimabukuro also participating in the removal of some of the sleeves. (Daniel TR at p. 54; Sealy TR at pp. 26, 27; Nishijima TR at p. 10; Shimabukuro TR at p. 11; Sonstein TR at pp. 12, 13). The removal of the sleeves is a difficult and time consuming process. The tire, brakes,

bearings and anti skid transducer are removed. The inside of the axle is then packed with dry ice to shrink it and the sleeve is heated with a torch to expand it. After a period of time to permit this shrinkage and expansion, the sleeve is removed by a puller. (Nishibun TR at pp. 51, 52). The whole process of removing the sleeve takes about 2 to 3 hours. (Murata TR at p. 12).

Mr. Nitta was relieved by Mr. Justin Calahara at 2 a.m. on Saturday morning, although it appears that certain of Mr. Nitta's crew continued working on the sleeves on aircraft 68 and 69. (Culahara TR at p. 11). Mr. Culahara was also a line maintenance manager. (Culahara TR at p. 10). Mr. Raymond Yoshioka was his lead mechanic. (Ugale TR at p. 10; Yoshioka TR at pp. 7, 10). Mr. Fred Ugale was one of the line maintenance mechanics. (Ugale TR at p. 10). My investigation was unable to ascertain the identity of the other members of Mr. Culahara's crew during the period of September 18 – 20, 1987. The makeup of the crews change and no records listing the crew members were available. Further, neither Mr. Culahara nor Mr. Yoshioka were able to recall what mechanics were working in their crew at that time. (Culahara TR at p. 13; Yoshioka TR at p. 10). Similarly, none of the HAL Forms 1128 or 46 were signed off by anyone identified as a member of Mr. Culahara's crew. It does appear, however, that Mr. Culahara's crew did participate in the removal of some of the sleeves on aircraft 68 and 69[8]. As indicated above, Mr. Nitta's crew worked

[8] Mr. Culahara testified that Mr. Yoshioka was working on the sleeves on at least one of the aircraft in question (Culahara TR at pp. 20, 21). As will be discussed later in greater detail, Mr. Ugale testified that his involvement was limited to cleaning two sleeves and that he had no other duties regarding the DC-9-50 axle sleeves (Ugale TR at p. 25). Mr. Yoshioka denied seeing any of the sleeves and the most notable feature of his testimony was his repeated lack of recollection of the incident (Yoshioka TR at pp. 12, 15, 16).

on the sleeves again which they returned to work on Saturday night and the evidence indicates that they did the bulk of the work on the sleeves.

Mr. Culahara's crew as replaced by the crew of Mr. Oliver Pohina who was also a line maintenance manager. Mr. Pohina testified that his crew did not have any involvement with the sleeves on aircraft 68 or 69 on either Friday or Saturday. (Pohina TR at p. 14). His crew did work on one of the DC-9-50 aircraft concerning the sleeves on Sunday. (Pohina TR at pp. 14, 15). The records indicate that all of the sleeves were replaced on aircraft 68 and 69 during the weekend of September 18 – 20, 1987. The records also indicate that the replacement of the last of the sleeves (sleeves on axles 3 and 4 on aircraft 69) was not completed and signed off until September 20, 1987. (Kagawa Deposition FAA Exhibit 2). In fact, Mr. James Kagawa, the HAL lead inspector, testified that these two sleeves were not signed off as completed until shortly before 10:30 p.m. on September 20, 1987. (Kagawa TR at pp. 34, 35, 36).

The records[9] and testimony indicate that the below listed HAL employees performed inspections on the following sleeves on aircraft 68 and 69:

> Mr. Nishibun indicated that he inspected the Number 1, 2 and 3 sleeves on aircraft 68 and the #1 and 2 sleeves on aircraft 69. (Nishibun FAA Exhibits 2 and 3; Nishibun TR at pp. 19, 29, 30).
>
> Mr. Kagawa indicated that he inspected the #1 sleeves on aircraft 68 and the #3 and 4 sleeves on aircraft 69. (Kagawa Deposition FAA Exhibits 2, 3, 4; Kagawa TR at pp. 23, 28, 30, 31, 32).
>
> Mr. Tracy Katano, a HAL inspector, indicated that he inspected the #2 and 4 sleeves on aircraft 68. (Katano Deposition FAA Exhibits 3 and 4: Katano TR at pp. 24, 25)
>
> Mr. Henry Ikezawa, a HAL inspector, indicated that he inspected the #1 and 2 sleeves on aircraft 69. (Ikezawa Deposition FAA Exhibit 3; Ikezawa TR at pp. 16, 17, 18).
>
> Mr. Douglas Kam entered his employee number as having inspected the #4 sleeve on aircraft 69. (Kam FAA Exhibits 2 and 3).

Request For The Sleeves By Mr. Murata

During the evening of September 18, 1987, Mr. Murata received a telephone call concerning the sleeves on aircraft 68 and 69. Mr. Murata testified that the caller

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[9] This information is indicated on the records by the employee placing his employee number in the blocks for the work assignments on the HAL Form 1128 or HAL Form 46. In some instances, initials or the last name are used.

told him that a sleeve was going to be removed from one of the HAL DC-9 aircraft. (Murata TR at p. 9). Mr. Murata further testified that the caller was Mr. Sealy. (Murata TR at p. 43). Mr. Murata then proceeded to the HAL maintenance facilities arriving at approximately 10 p.m. on Friday night. (Murata TR at p. 9). He introduced himself to Mr. Nitta, Mr. Nishibun, and Mr. Ikezawa and indicated he desired to go to the work area where work was going on with the DC-9 aircraft. (Murata TR at pp. 9, 10). Mr. Murata then proceeded to aircraft 69 where Mr. Sealy and Mr. Daniel were working. (Murata TR at p. 11; Mr. Murata looked at the right inboard and right outboard sleeves on aircraft 69. (Murata TR at p. 12; Murata Deposition FAA Exhibit 4). At the time of this inspection, the sleeves were still on the aircraft. (Murata TR at p. 12; Daniel TR at p. 48). Mr. Murata testified that the inboard sleeve was badly sanded with a cut about 1/16 inch deep and two inches long. The outboard sleeve was badly galled. (Murata TR at p. 13). Both Mr. Sealy and Mr. Daniel agreed that the sleeves looked at by Mr. Murata were damaged. (Sealy TR at p. 24; Daniel TR at p. 50). In fact, the testimony of all three individuals present at Mr. Murata's inspection of aircraft 69 agreed that the damage to the two sleeves was beyond tolerance. (Murata TR at pp. 50, 51; Daniel TR at p. 75; Sealy TR at p. 20).

Mr. Murata then went to Mr. Nitta and requested the two sleeves which he had looked at. (Murata TR at p. 14; Nitta TR at p. 28). Mr. Murata identified the sleeves he wanted. (Nitta TR at p. 28). Because it would take so long to remove the sleeves, Mr. Murata told Mr. Nitta that he would return early on Saturday morning for the sleeves. (Nitta TR at p. 31). He also requested Mr. Nitta to tell Mr.

Culahara (who was the next line manager coming on duty) to have the sleeves ready so he could conduct a further inspection of the sleeves. (Murata TR at p. 15; Nitta TR at p. 31). Mr. Nitta agreed to do so.

After talking with Mr. Murata, Mr. Nitta called Mr. Joe Honma, HAL Director of Base Maintenance, for guidance as to whether the sleeves should be given to the FAA. (Honma TR at p. 22; Nitta TR at p. 26). Mr. Honma in turn called Mr. Wells for guidance. Mr. Wells told Mr. Honma that they should not give the sleeves to the FAA until after HAL had a chance to look at them. (Honma TR at pp. 22, 23)[10]. Mr. Honma then called Mr. Nitta back and told him that the "big bosses" wanted to see the sleeve before it was handed over to the FAA. (Nitta TR at p. 27). Mr. Nitta then relayed this information to Mr. Culahara when he came on duty. (Nitta TR at p. 31). He also told Mr. Culahara that Mr. Mutata would be coming back for the sleeves Saturday morning. (Nitta TR at p. 31). During their telephone conversation, Mr. Wells did not give Mr. Honma any instructions as to what was to be done with the sleeves (Wells TR at p. 38) and Mr. Honma gave no such instructions to Mr. Nitta (Honma TR at p. 24). Similarly, Mr. Nitta gave no instructions to Mr. Culahara as to what was to be done with the sleeves after they were removed (Nitta TR at p. 31) and Mr. Culahara neither attempted to identify the sleeves requested by Mr. Murata or to give any instructions to the mechanics as to

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[10] Mr. Wells testified that he did not want to give the requested sleeves to the FAA until they had gotten a proper receipt and had the sleeves inspected. He indicated that he wanted to keep control (Wells TR at p. 37).

what should be done with the sleeves (Culahara TR at pp. 17, 18, 22, 23).

Mr. Murata returned to the HAL facility on Saturday morning at 8 a.m. to obtain the two sleeves he requested. He talked to a number of people but was unable to find the sleeves or to determine where they were located[11]. When Mr. Murata was unable to locate the sleeves, he went to Mr. Culahara and requested the sleeves from him. Mr. Culahara told him that he could not release the sleeves because Mr. Wells in a telephone conversation had told him not to release the sleeves. (Murata TR pp. 22, 23; Culahara TR at p. 42)[12]. After this conversation with Mr. Culahara, Mr. Murata attempted to call Mr. Wells on Saturday but was not able to reach him. (Culahara TR at p. 3; Murata TR at pp. 22, 23). Mr. Culahara then suggested to Mr. Murata that he would attempt to talk to Mr. Wells and that Mr. Murata should stop by on Sunday morning. (Murata TR at p. 23; Murata Deposition FAA Exhibit 4). Mr. Murata returned again on Sunday and was told by Mr. Culahara that Mr. Wells would not release the sleeves to him. (Culahara TR at p. 43; Murata TR at p. 25; Murata FAA Exhibit 4). Mr.

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[11] On Saturday morning, Mr. Murata talked to Mr. Edwin Tatami (HAL Manager of Aircraft Overhaul), Mr. Fred Ugale, Mr. Reza LaSane (HAL Overseas Maintenance Manager) and Mr. Culahara (Murata TR at pp. 18, 19; Tatami TR at pp. 12; LaSane TR at pp. 8, 12, 13; Ugale TR at pp. 23, 23; Culahara TR at pp. 40, 41).

[12] Mr. Culahara testified that when he called Mr. Wells on Saturday, he was told not to release the sleeves because Mr. Wells wanted to speak with the HAL attorney (Culahara TR at p. 42).

Murata then talked to Mr. Wells by telephone and was told that Mr. Wells would not release the sleeves until he talked to the HAL lawyer. (Wells TR at pp. 45, 46; Murata FAA Exhibit 4)[13]. Mr. Murata then terminated his effort to obtain the two sleeves. Mr. Murata prepared notes concerning his efforts to obtain the two sleeves. These notes were prepared on the same day and were admitted as FAA Exhibit 3 in his deposition. (Murata TR at p. 30).

During the weekend, there were two sleeves that apparently came off one of HAL DC-9-50 aircraft which were retained. Mr. Ugale testified that he found two sleeves on a tool box on Saturday. He took them to Mr. Culahara who told him to clean the sleeves[14]. Mr. Ugale did not know which aircraft the two sleeves came from and there were no tags on the sleeves to identify them. (Ugale TR at pp. 11, 12, 15). Mr. Culahara told Mr. Ugale to take the sleeves to the engine shop to clean them. (Ugale TR at pp. 11, 15). Mr. Ugale met Mr. Murata after he had left the two sleeves in the engine shop. (Ugale TR at p. 23). Mr. Murata asked him where the sleeves were and he told Mr. Murata they were soaking in the tank. (Ugale TR at p. 24). Mr. Ugale went back later and could not find the sleeves. He went back a third time and found the sleeves on a cart. (Ugale TR at pp. 18, 19, 20). He then

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[13] Mr. Culahara testified that he thought that Mr. Murata was unsuccessful in contacting Mr. Wells. However, both Mr. Murata and Mr. Wells testified that a telephone conversation between them did occur on Sunday.

[14] The evidence indicates that there is frequently grease on the sleeves when they are taken off (Mitara TR at p. 34).

left them in Mr. Culahara's office[15]. Mr. Murata did call Mr. Beckner on Sunday to brief him as to what happened. (Murata TR at p. 47; Beckner TR pp. 11, 38).

As will be discussed further, these two sleeves were subsequently turned over to the FAA. Mr. Murata testified that he did inspect these two sleeves that were produced by HAL and that they were not the two sleeves that he inspected Friday night on aircraft 69. He specifically testified that the sleeves produced by HAL did not have any gouges, scratches, or marks such as he had observed on the sleeves on aircraft 69 on Friday night. Because of this clean condition, Mr. Murata concluded that they were different sleeves. (Murata TR at pp. 27, 28). I also had an opportunity to inspect the sleeves and did not note any of the markings described by Mr. Murata and Mr. Daniel. For these reasons, it is considered that the two sleeves produced by HAL were not the sleeves inspected and requested by Mr. Murata[16].

Events Following HAL Replacement of the Sleeves

On Monday, September 21, 1987, Mr. Murata briefed Mr. Beckner and Mr. Teixeira on the events of that weekend. Based on this briefing, Mr. Beckner drafted and sent a second letter to HAL. This letter is designated as Beckner FAA Exhibit 2 and Teixeira FAA Exhibit 3. The letter

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[15] Mr. Ugale believed these were the same two sleeves because when he found them they were still wet on the bottom as if they had been in the cleaning tank (Ugale TR at p. 26).

[16] Mr. Murata specifically testified that the presented sleeves looked good. (Murata TR at p. 28).

was jointly drafted by Mr. Beckner and Mr. Teixeira. (Teixeira TR at p. 16; Beckner TR at pp. 12, 13). The purpose of the letter was to advise HAL that the FAA had become aware of the fact that the requested inspections had been completed over the weekend despite the FAA request that the inspections be accomplished in the presence of two FAA inspectors. The letter also clarified the intent of the September 18, 1987 letter by specifically indicating that the inspection was to include the sleeves. The letter also emphasized that the FAA intended to inspect the aircraft and that all the removed sleeves should be given to the FAA for an airworthiness inspection. (Teixeira TR at p. 16; Teixeira FAA Exhibit 3). In response to this second letter, HAL arranged for a meeting on September 23, 1987 at the Honolulu FSDO. Present at the meeting were Mr. Finazzo, Mr. Wells, and Mr. Ogden from HAL and Mr. Beckner, Mr. Teixeira and Mr. Murata for the FAA. (Teixeira TR at pp. 18, 19; Beckner TR at pp. 14, 16). At the meeting, HAL presented the two sleeves that were cleaned by Mr. Ugale and advised the FAA that they could not locate any of the other sleeves. (Beckner TR at p. 14; Teixeira TR at p. 18; Wells TR at p. 52). These two sleeves were secured in a locked safe[17].

HAL also presented a letter dated September 22, 1987, which was drafted and signed by Mr. Wells. (Ogden TR at p. 21; Teixeira Deposition FAA Exhibit 4; Beckner Deposition FAA Exhibit 3). This letter stated HAL's position concerning the inspection of the aircraft and sleeves.

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[17] The sleeves were subsequently inspected by Mr. Murata and later by myself. I also authorized HAL personnel to inspect those sleeves at the Honolulu FSDO.

It indicated that Mr. Finazzo ordered the inspection to be commenced immediately to ensure the airworthiness of the aircraft. The letter also indicates that HAL was not willing to delay the inspection for the three day period after receipt of the September 18, 1987 letter. It also states that Mr. Murata did request on September 20, 1987 that all removed sleeves be retained and advised the FAA that HAL was presenting two of the removed sleeves but was unable to locate any other of the removed sleeves. The letter further summarized HAL's position that the problem should have been addressed immediately and not three days later as provided in the FAA letter of September 18, 1987. Finally, HAL offered to have the aircraft reinspected on the evening of September 23, 1987. The FAA did not reinspect the aircraft as offered by HAL because it was clear that the sleeves had already been removed and that was the portion of the aircraft for which the FAA considered that needed to be reinspected. (Teixeira TR at p. 42).

IV. ANALYSIS OF SPECIFIC ISSUES RAISED IN THE ORDER OF INVESTIGATION

A. Compliance With Section 609(a) of the Federal Aviation Act of 1958

Section 609(a) of the Federal Aviation Act of 1958, as amended provides in part:

> *"The Administrator may,* from time to time, *reinspect any civil aircraft,* aircraft, engine, propeller, appliance, air navigation facility, or air agency, or may re-examine any civil air [49 U.S.C. 1429(a)] (emphasis added)."

This section has been interpreted as authorizing the Administrator to re-examine any civil airman at any time and to require the airman to submit to this re-examination. *Dois Wesley Miller,* 13 CAB 203, 204 (1950); *Administrator v. Harper,* 1 NTSB 219, 222 (1968). While the majority of the cases involve the exercise of the authority to re-examine an airman, it is clear from both the express language of the statute as well as case law[18] that the Administrator has authority to reinspect any civil aircraft. *Administrator v. Anderson Aircraft Corp.,* 3 NTSB 3252, 3255 (1981).

The reported decisions by the NTSB indicate that the Administrator's authority under this section is not unfettered or unlimited. Rather, the decisions indicate that the Administrator's authority is to reinspect the aircraft or re-examine the airman where there are reasonable grounds to question the airman's competency or the airworthiness of the aircraft. *Gerley Stephen DeFazio,* 18 CAB 931 (1954); *Administrator v. Sector,* 1 NTSB 324, 325, note 3 (1968); *Administrator v. Harrington,* 1 NTSB 1042, 1043-1044, (1971); *Administrator v. Terwilliger,* 1 NTSB 1096, 1097 (1971). This requirement has been defined as requiring that the Administrator only be able to demonstrate a reasonable basis for believing that pilot competency (or aircraft airworthiness) is in question. *Administrator v. Ringer,* 3 NTSB 3948, 3949 (1981); *Administrator v. O'Day,* NTSB Order EA-1953 at page 4 (1983). It

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[18] My research has not revealed any Federal court decisions relating to Section 609. As indicated above, there are numerous NTSB decisions which are considered to constitute precedent in this area.

has also been required that the scope of the re-examination be reasonably related to the qualifications under question and not be unduly broad. *Administrator v. Hinman,* 2 NTSB 2496 (1976).

While Section 609(a) of the Federal Aviation Act of 1958 was not specifically referred to in the Order of Inspection, I was charged with determining whether HAL or any of its employees violated any other Federal regulation or statute. In my opinion, this charge includes any possible failure by HAL to comply with the requirements of Section 609. Therefore, this portion of the report will deal with the issues of whether a request was made by the FAA under Section 609; whether there was a reasonable basis for issuing a request under that section; and whether HAL complied with any request issued under Section 609.

As to the first issue, it is clear from the investigation that a request was made by the FAA to HAL to make aircraft 68 and 69 available for reinspection in the presence of two FAA inspectors. This request was contained in the FAA letter of September 18, 1987, and was specifically made pursuant to and under the authority provided by Section 609(a) of the Federal Aviation Act of 1958. (Teixeira FAA Exhibit 2 at lines 4 and 5). Both Mr. Teixeira and Mr. Beckner testified that they had made the request under Section 609(a) of the Federal Aviation Act of 1958. (Beckner TR at p. 7; Teixeira TR at p. 10). Accordingly, it is concluded that the September 18, 1987 letter constituted a request for reinspection of aircraft 68 and 69 pursuant to Section 609(a) of the Federal Aviation Act of 1958.

As to the second issue of whether there was a reasonable basis for a Section 609(a) reinspection of aircraft 68 and 69, both Mr. Beckner and Mr. Teixeira testified that they relied on the handwritten notes which were provided by Mr. Sealy. Mr. Beckner testified that his review of the notes led him to conclude that there may be an airworthiness problem with the two aircraft. (Beckner TR at pp. 8, 9). He specifically characterized the notes as constituting a reason to suspect that there may be a problem with the sleeves and that, when coupled with the existing case involving the sleeve on aircraft 70, he considered the information in the notes sufficient to warrant the FAA to have a look at the sleeves. (Beckner TR at p. 30). Mr. Teixeira testified that there was not strong enough evidence to ground the aircraft under Section 605 of the Federal Aviation Act of 1958, as amended (Teixeira TR at p. 30).

It is my conclusion that the information contained in the notes provided to the FAA did constitute a reasonable basis for the FAA to request a reinspection of the sleeves on aircraft 68 and 69. While it is true that the notes were anonymous (at least at the time they were presented), the information was specific and was purportedly given by HAL mechanics who had personal firsthand knowledge of the aircraft. (Teixeira TR at p. 25; Beckner TR at pp. 22, 23, 24, 25). Under the above cited NTSB decisions, the test is not whether the FAA has evidence establishing that the aircraft were not airworthy. Rather, the test is whether the FAA has information which gives reason to believe that the aircraft *may not* be airworthy (emphasis added). It is my opinion that the information contained in the notes clearly meets this requirement.

As to the remaining issue, the evidence indicates that HAL did not comply with the FAA's request made under Section 609(a) of the Act – the FAA requested that the main landing gear sleeves of aircraft 68 and 69 be reinspected in the presence of two FAA inspectors on September 21, 1987 and this was not accomplished in that HAL did not provide the aircraft for the requested reinspection on the designated date, and in fact modified the main landing gear assemblies by replacing the sleeves prior to that date. However, this does not answer the question of whether HAL violated Section 609(a). In its brief, HAL submits that it conducted an immediate removal of the sleeves because it considered a delay of the inspection for three days to be not acceptable from a safety standpoint. HAL further contends that, due to the strained relationship between it and the FAA, it could not rule out the possibility that it was being set up for enforcement action if it allowed the aircraft to fly an additional 45 flights that weekend. (HAL Brief at p. 6). HAL further submits that the FAA's actions in delaying its notification from Tuesday until Friday and then delivering the letter late Friday afternoon contributed to this misunderstanding and led to the sleeves being removed without being inspected by the FAA. (HAL Brief at pp. 23, 24).

The points raised by HAL are considered to constitute a reasonable basis for HAL to immediately schedule the inspection/removal of the sleeves rather than wait until September 21, 1987, as requested in the September

18, 1987 letter[19]. In other words, it cannot be said that the actions by HAL to correct a possible airworthiness problem at an earlier date were unreasonable. In this connection, it is noted that the FAA witnesses indicated that, if advised, the Agency would have modified the schedule so as to conduct the inspection on the earlier date[20]. Similarly, the timing of the delivery of the 609 letter on Friday afternoon is considered to be an extenuating factor in this case. However, for the reasons set forth below, it is my opinion that the points presented by HAL in its defense do not excuse the failure of HAL to either to notify the FAA of the changed schedule or to take action to preserve the sleeves until they could be jointly inspected by HAL and the FAA.

The evidence indicates that on September 18, 1989, HAL management understood the FAA's "609" letter to include a reinspection of the sleeves. In their initial conversation, Mr. Wells advised Mr. Finazzo that the sleeves were involved in the FAA request and might have to be replaced along with other items. (Finazzo TR at pp. 30, 31). Mr. Wells testified that after being read the letter, he told Mr. Finazzo that he "assumed that the FAA was

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[19] In fact, Mr. Teixeira conceded in his testimony that it was reasonable for a carrier to schedule an inspection earlier than had been requested by the FAA. (Teixeira TR at p. 40).

[20] Mr. Beckner testified that if HAL had called him and said that it could do the inspection on Friday night, he would have sent the two inspectors over at that time. (Beckner TR at p. 32). Such an accelerated inspection had been accomplished in connection with aircraft 70 where the FAA had requested to look at the sleeve next time HAL had the wheel off and HAL inspected it earlier and notified the FAA. (Ogden TR at pp. 22, 23).

primarily referring to the axle sleeves which were part of the main landing gear, * * * ." (Wells TR at p. 14, lines 19-21)[21]. Further, during their conversation on September 18, 1987, Mr. Wells and Mr. Ogden concluded that the FAA requested inspection was limited to the sleeves. (Ogden TR at p. 47). Mr. Honma testified that on Friday afternoon he was told by Mr. Wells that the FAA was going to inspect the sleeves on Aircraft 68 and 69 and "We want to look at it this weekend". (Honma TR at P. 32, lines 22, 23) Thus, before any action was taken on September 18, 1987, HAL management personnel were aware that the concern of the FAA in requesting the reinspection was directed solely to the sleeves on aircraft 68 and 69[22].

The sleeves in question are considered expendable items and are not considered to be repairable. The normal HAL practice was to discard the sleeves after they were removed from the aircraft. (Wells TR at p. 40; Ogden TR at pp. 13, 39). Because of this, the sleeves were also not considered a controllable item and did not contain any serial number or identifying marking. (Wells TR at p. 40; Ogden TR at p. 39). Thus, under ordinary practice, once a sleeve was removed, there would be no way to determine which aircraft it had been removed from and the sleeve would be thrown away. With the sleeves being inspected and removed Friday night, it is clear that, unless HAL

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[21] Mr. Wells testified that he arrived at this conclusion due to another case involving the axle sleeve on aircraft 70 and assumed that the instant case was a carry on from that matter. (Wells TR at p. 15).

[22] Mr. Ogden testified that it was both his and Mr. Wells' impression that the FAA were not interested in the rest of the aircraft. (Ogden TR at p. 47).

either notified the FAA so the latter could inspect the sleeves when they were removed, or tagged the sleeves so they could be identified and inspected later on, there would be no way that the FAA would have been able to inspect the sleeve on Monday as they had requested. This fact was also known or should have been known by HAL management prior to any action being taken[23].

Despite this, HAL took no effort (other than one possible call by Mr. Wells) to notify the FAA of the advanced schedule. Mr. Finazzo testified that he did not attempt to advise the FAA himself as he assumed that Mr. Wells would tell the FAA or order someone to do so. (Finazzo TR at p. 23)[24]. As mentioned previously, Mr. Wells may have attempted to call the FAA but was unsuccessful if such an attempt was made. (Wells TR at pp. 27, 28)[25]. There was no discussion in the telephone conversation between Mr. Wells an Mr. Ogden about notifying the FAA. (Ogden TR at p. 16). The bottom line was that no

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[23] Mr. Wells conceded that if the normal procedure was followed, the sleeve would be destroyed. However, he contended that he did not focus on someone discarding the sleeves that quickly. He did concede that there would be no way to tell which sleeve had been taken off which aircraft. (Wells TR at pp. 40, 41). Mr. Ogden candidly conceded if normal procedures were followed the sleeves would not be available for anyone to inspect. (Ogden TR at p. 13).

[24] Mr. Finazzo also testified that he was under the impression that the FAA would be present on at least have the opportunity to be present. (Finazzo TR at p. 24).

[25] Even this call (if made) was not expressly for the purpose of notifying the FAA of the changed schedule. Mr. Wells testified that he was not calling the FAA to notify them of the inspection but to find out what was going on. (Wells TR at p. 17).

one in HAL management notified the FAA or even attempted to notify them of the changed schedule. As a result, the FAA never learned of the inspection until it was informally notified by Mr. Sealy after the inspection had already started. Based on all the circumstances, I do not consider that HAL took reasonable efforts to notify the FAA of its intention to immediately inspect and remove the sleeves[26].

Furthermore, on September 18, 1987, HAL also took no action whatsoever to tag and preserve the sleeves for later inspection. During his conversation with Mr. Wells, Mr. Finazzo did not give any instructions concerning the retention or destruction of the sleeves, leaving it to Mr. Wells to do whatever is necessary. (Finazzo TR at pp. 13, 14, 29, 32)[27]. Mr. Wells did not discuss with Mr. Ogden during their telephone conversation what should be done with the sleeves after their removal. (Ogden TR at p. 13). Furthermore, Mr. Wells did not tell Quality Assurance what to do with the sleeves after their removal and there was no instructions contained in the HAL Forms 1128 for aircraft 68 and 69. (Wells TR at pp. 26, 27; Wells Deposition FAA Exhibits 4 and 5). Thus, the bottom line again is that HAL took no steps to tag or otherwise identify the

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[26] Mr. Beckner testified that he was always on call and that there was a standby duty available 24 hours a day. (Beckner TR at pp. 32, 33). Mr. Sealy was able to contact Mr. Murata on Friday evening. Mr. Murata also testified that his home phone number was kept at the HAL maintenance office. (Murata TR at p. 43). It is concluded that HAL could have advised the FAA if it made a reasonable attempt to do so.

[27] This is considered understandable in view of Mr. Finazzo's position with HAL.

removal sleeves or to return them for further inspection. Mr. Wells testified that he had no objection to the FAA inspecting the sleeves but that his instruction from Mr. Finazzo were to change all the sleeves immediately. (Wells TR at pp. 16, 21). While, Mr. Wells may not have intentionally attempted to prevent the FAA inspecting the sleeves, the end result of his actions were that the inspection could not be accomplished because no steps were taken to preserve the sleeves for such inspection.

This failure on the part of HAL personnel to take appropriate action continued in connection with Mr. Murata's request for the two sleeves from aircraft 69[28]. Mr. Murata did make a timely request to Mr. Nitta for the two sleeves while they were still on the aircraft. (Murata TR at pp. 14, 15; Nitta TR at pp. 18, 19, 24). Mr. Nitta promptly called Mr. Honma informing him of the request and asking for instructions as to what he should do. (Nitta TR at p. 26; Honma TR at p. 22). Mr. Honma then called Mr. Wells advising him of the inquiry. (Honma TR at p. 22). As indicated in the preceding part, Mr. Wells instructed Mr. Honma not to give the sleeves to the FAA and this was relayed to Mr. Nitta. Despite this specific request, Mr. Wells did not give Mr. Honma any instructions as to what was to be done with the two sleeves. (Wells TR at p. 38)[29]. Mr. Honma did not give any instructions to Mr. Nitta concerning what was to be done with

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[28] Mr. Murata's request is considered to be in furtherance of the FAA's "609(a)" request of September 18, 1987.

[29] Mr. Wells testified that he was aware that the normal practice was to throw away the sleeves but he did not think it would be done before Monday. (Wells TR at p. 38).

the two sleeves. (Honma TR at p. 23)[30]. Mr. Nitta in turn did not give any instructions to Mr. Culahara to tag the sleeve. (Nitta TR at p. 34). Mr. Nitta did tell Mr. Culahara that the FAA had requested some of the sleeves and to hold the sleeves. (Culahara TR at p. 17). Mr. Nitta did not identify the requested sleeves to Mr. Culahara who did not know which sleeves he was referring to. Despite this, Mr. Culahara did not attempt to ascertain which aircraft the sleeves were purportedly being taken from. (Culahara TR at. p. 17)[31]. Finally, the HAL mechanics who were removing the two sleeves, Mr. Sealy and Mr. Daniel, were not given any instructions as to what was to be done with sleeves. (Sealy TR at p. 24; Daniel TR at pp. 23, 24; Shimabukuro TR at p. 16; Nishijima TR at p. 17). As was discussed above, my conclusion is that the two sleeves requested by Mr. Murata were not retained by HAL and were not turned over to the FAA.

In summary, taking the evidence in the best light to HAL and accepting at face value the testimony of its personnel, it appears that HAL failed to take reasonable steps to notify the FAA so the latter could participate in the accelerated inspection and also failed to take any steps to have the removed sleeves tagged and preserved for later inspection. This not only involved HAL's failure

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[30] Mr. Honma testified that since he told Mr. Nitta that Mr. Wells wanted to see the sleeves he assumed that Mr. Nitta would keep the two sleeves. (Honma TR at p. 24).

[31] At the time, Mr. Nitta was relieved by Mr. Culahara, the sleeves were still on the aircraft and Mr. Daniel was still working on removing them. Apparently, on that day (September 19, 1987), Mr. Daniel and Mr. Nishibun worked longer than Mr. Nitta. (Nitta TR at pp. 29, 30).

to issue such instructions at the time the removal was ordered but also included a failure to take proper steps to retain the two sleeves requested by Mr. Murata. Even after Mr. Murata's request, there apparently were no instructions given to ensure retention of other sleeves still being removed despite the fact that the inspection and replacement of the lost sleeves was not completed until late on the evening of September 20, 1987[32].

The inspection also uncovered evidence of actions on the part of certain HAL middle management personnel to intentionally take the sleeves as soon as they were removed from the aircraft. Mr. Daniel and Mr. Sealy both testified that they saw Mr. Culahara and Mr. Nitta pick up sleeves soon after they were removed from the aircraft and drive away with them utilizing a golf cart or pick up truck. (Daniel TR at p. 55; Sealy TR at pp. 27, 28). On this point, Mr. Daniel's testimony was more specific. He testified that he was told that the line managers wanted the sleeves and that the mechanics were to make sure that the managers got possession of them. (Daniel TR at pp. 56, 57). He also testified that at one point in time that weekend he bid one of the sleeves with the intention of giving it to the FAA. According to Mr. Daniel, Mr. Culahara

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[32] Mr. James Kagawa testified that two of the sleeves were not signed off as having been inspected until approximately 2230 on September 20, 1987. (Kagawa TR at pp. 24, 25, 28, 29, 34, 35). The majority of the HAL inspections and mechanics involved in the inspection and removal process (in addition to those already discussed) testified that they had been given no instructions as to what was to be done with the sleeves. (Omoto TR at p. 10; Sonstein TR at p. 13; Kam TR at p. 20; Pohina TR at p. 30).

threw a "raving fit" (Daniel TR at p. 71, line 8) while attempting to locate the missing sleeve. Due to concern over Mr. Culahara's actions, Mr. Daniel testified that he returned the sleeve in Mr. Culahara's absence. The sleeve was also subsequently taken by Mr. Culahara. (Daniel TR at pp. 57, 70, 71, 73)[33].

On the other hand, Mr. Nitta and Mr. Culahara[34] denied even seeing any of the sleeves much less taking any of them into their possession on that weekend. (Culahara TR at p. 22; Nitta TR at p. 32). The other members of Mr. Nitta's crew testified that they either did not remember what happened to the sleeves after they were removed or did not know what happened to them[35].

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[33] Mr. Daniel also testified that he overheard some of the mechanics joking that Mr. Culahara and Mr. Nitta were going to take the sleeves to the lagoon and give them the "float test" – throw them in the lagoon to see if they could float. Mr. Daniel testified that he did not actually observe any sleeve being thrown into the lagoon. (Daniel TR at pp. 73, 74).

[34] Mr. Culahara, of course, did indicate that he was told of the two sleeves found by Mr. Ugale but denied ever seeing those two sleeves. (Culahara TR at pp. 40, 41).

[35] Mr. Sonstein testified that he took the sleeves and put them on a golf cart. He did not remember what happened to them after and did not know who carried the sleeves away. (Sonstein TR at pp. 14, 15). Mr. Nishijima testified that he did not see what happened to the sleeves after they were taken off the aircraft. He also indicated he last saw the sleeves on the ground and doesn't know what happened to them after that. (Nishijima TR at pp. 17, 18). Mr. Shimabukuro testified that he set the sleeves down after removing them. (Shimabukuro TR at p. 15). Mr. Nishibun testified that he did not recall specifically what happened to the sleeves or recall them being given to Mr. Nitta. (Nishibun TR at pp. 26, 28).

Both Mr. Sonstein and Mr. Nishibun did recall either putting or seeing the sleeves on a golf cart. (Nishibun TR at pp. 27, 28; Sonstein TR at p. 14). Mr. Nishibun also indicated that he thought the sleeves were tagged and returned to either the foreman or supply room but did not recall specifically. (Nishibun TR at p. 26). No other evidence was obtained regarding what was done with the sleeves after the removal. Thus, there is a direct conflict between the testimony of Mr. Sealy and Mr. Daniel on the one hand and Mr. Culahara and Mr. Nitta on the other hand which would require a credibility determination by any trier of fact in any subsequent action[36]. It is evident that a finding in favor of Mr. Daniel's testimony and Mr. Sealy's testimony would indicate an intentional violation of Section 609(a) by certain of HAL management personnel[37] and would greatly aggravate non-compliance with Section 609(a) of the Act.

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[36] At the time of his deposition, Mr. Daniel was no longer employed with HAL and had moved to Kentucky where he owns an auto and truck part business. (Daniel TR at p. 8). He testified that he left HAL after being asked to sign off some work that he did not consider proper. while HAL in its brief contends his testimony is clouded by his admitted friendship with Mr. Norris and Mr. Sealy. (HAL Brief at p. 21) on balance I considered Mr. Daniel to be a credible witness in terms of demeanor and lack of personal interest.

[37] No direct evidence was found which connected Mr. Finazzo, Mr. Wells, Mr. Ogden, or Mr. Honma with any alleged intentional destruction of the sleeves or knowledge of any such actions by Mr. Culahara or Mr. Nitta. There is a question as to whether HAL middle managers would take such action on their own volition.

The credibility of Mr. Sealy's testimony is subject to attack in view of his denial or lack of recollection of turning the notes over to the FAA on September 15, 1987, a point which is vigorously argued by HAL. (HAL Brief at pp. 20, 21). As stated previously, I do conclude that Mr. Teixeira's and Mr. Beckner's testimony is more credible on that particular point. It should be noted that at the time of his deposition, Mr. Sealy was still an employee of HAL and was observed to be nervous throughout his testimony. As to Mr. Nitta and Mr. Culahara, no adverse observations were made as to their demeanor during their deposition. both individuals are still HAL employees and clearly have a direct interest in the outcome of the investigation in that the actions described by Mr. Daniel and Mr. Sealy would in my opinion constitute individual violations of Section 609(a) of the Act.

In the past, Section 609(a) of the Act has been enforced by the issuance of an Order of Suspension under that section suspending the pertinent airman certificate until the airman accomplishes the requested re-examination or reinspection. In this case, the requested reinspection cannot be accomplished at this time and, in fact, could not have been accomplished after September 20, 1987. In fact, this case differs from the reported cases in that in this case the action, or lack of action by HAL prevented the accomplishment of the re-inspection. Therefore a remedial Order of Suspension could serve no purpose. Further, a punitive Order of Suspension would appear to be barred by the National Transportation Safety Board's stale complaint rule (821 CFR 33).

Section 901(a)(1) of the Federal Aviation Act of 1958, as amended, provides that any person who violates any

provision of Title VI of the Federal Aviation Act of 1958 shall be subject to a civil penalty not to exceed $1000 for each violation[38]. While I am not aware of prior precedent on this point, it is my opinion that Section 901(a)(1) would be applicable to cases involving non-compliance with the reexamination/-reinspection provisions of Section 609(a) of the Federal Aviation Act of 1958 which is clearly a provision of Title VI of the Act.

B. Compliance with Section 43.13 or 121.153(a)(2) of the Federal Aviation Regulations.

The Order of Investigation specifically directed me to ascertain the condition of the removed sleeves and whether HAL or any of its employees may have violated Sections 43.13 or 121.153(a)(2) of the Federal Aviation Regulations.[39].

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[38] This is the provision that was in effect in 1987. The statute has, of course, subsequently been amended.

[39] Section 43.13 of the Federal Aviation Regulations (14 CFR, Section 43.13) provides:

> (a) Each person performing maintenance, alteration, or preventive maintenance on an aircraft, engine propeller, or appliance shall use the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual or Instructions for Continued Airworthiness prepared by its manufacturer, or other methods, techniques, and practices acceptable to the Administrator, except as noted in Section 43.16. He shall use the tools, equipment, and test apparatus necessary to assure completion of the work in accordance with accepted industry practices. If special equipment or test apparatus is recommended by the manufacturer involved, he must use that equipment or apparatus or its equivalent acceptable to the Administrator.
>
> (b) Each person maintaining or altering, or performing preventive maintenance, shall do that work in such a manner and use materials of such a quality, that the condition of the aircraft, airframe, aircraft engine, propeller, or appliance worked on will be at least equal to its original or properly altered condition (with regard to aerodynamic function, structural strength, resistance to vibration and deterioration, and other qualities affecting airworthiness).

Section 121.153(a)(2) of the Federal Aviation Regulation [14 CFR Section 121.153(a)(2)] provides:

> (a) Except as provided in paragraph (c) of this section, no certificate holder may operate an aircraft unless that aircraft –
>
> (2) Is in an airworthy condition and meets the applicable airworthiness requirements of this chapter, including those relating to identification and equipment.

This portion of the investigation examines and considers the following issues:

1. Whether the evidence indicated that any of the sleeves on aircraft 68 and 69 were in a damaged condition at the time of their removal?
2. If so, whether any of the damage was so severe as to be beyond manufacturer's tolerance and limits?
3. Whether any damage beyond tolerance occurred in such a manner as to constitute a violation of either Sections 43.13 or 121.153(a)(2) of the Federal Aviation Regulations?

At the outset, it must be emphasized that this investigation was greatly hampered by the fact that the sleeves

were destroyed during the weekend of September 18-20, 1987. Because of this, the sleeves were not available for expert testing or examination to ascertain their condition. Accordingly, my investigation and report centers upon an examination of the records that are available and on the testimony of the various witnesses.

As to the first issue above, the evidence conclusively indicates that a number of the sleeves removed from aircraft 68 and 69 had sustained some sort of damage at the time they were removed from these aircraft. First of all, a majority of the persons who saw the sleeves on that weekend testified to observing some damage on at least some of the sleeves. Of these, eight witnesses described the damage as consisting of cuts, gouges or scratches[40]. Three witnesses testified that they recalled seeing marks

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[40] Mr. Murata described the two sleeves he saw as gouged or badly scratched. (Murata TR at pp. 12, 13). Mr. Daniel testified that he saw sleeves from the two aircraft with severe cuts, wear marks and a chisel mark. (Daniel TR at pp. 43, 44, 46). Mr. Sealy testified that he observed gouges and scratches on six sleeves. (Sealy TR at pp. 20, 21). Mr. Katano testified that he observed dents, scratches and gouges on a number of the sleeves. He inspected between 5 and 10 sleeves and some were not damaged but he could not recall how many. (Katano TR at pp. 26, 27, 31). Mr. Ikezawa testified that he looked at two sleeves which were in the condition reflected by him in the records which indicated they were gouged. (Ikezawa TR at pp. 25, 26). Mr. Kagawa had no present recollection but confirmed that the records correctly indicated his observation at the time – that the sleeves were gouged. (Kagawa TR at pp. 30, 31, 32). Mr. Shimabukuro testified that he saw scratches on two or three sleeves. (Shimabukuro TR at p. 14). Mr. Nishibun testified that the saw scratches and small gouges on three of the sleeves. (Nishibun TR at p. 21).

on some of the sleeves but could not describe the nature of the marks. (Kam TR at pp. 13, 15; Sonstein TR at p. 15; Nitta TR at p. 28). Only two witnesses testified to not seeing any marks or scratches on any of the sleeves they looked at (Ugale TR at pp. 14, 15; Mihara TR at p. 49)[41].

As to the records examined, neither of the HAL Forms 1128 for aircraft 68 and 69 contained any information concerning the condition of the sleeves other than that a number of them were removed. However, the HAL Forms 46 indicate that the sleeves had some sort of damage. Four of the sleeves were indicated as being gouged; two were described as damaged; and another had evidence of "axle sleeve reworked (grinded)." (Ikezawa Deposition FAA Exhibit 2). In summary, there is conclusive evidence that the majority of the sleeves had damage at the time of their inspection.

While the above testimony and records readily establishes that the sleeves had experienced some degree of damage, the evidence adduced was not as complete as regards the second issue – whether the damage on the sleeves exceeded the manufacturer's tolerance limits. First, neither the HAL forms 1128 or 46 contain any entries regarding this question. In addition, HAL did not prepare any reports concerning the conditions of the sleeves other than the HAL Forms 1128 or 46. (Ogden TR at p. 36). Thus, there are no records relating to this issue.

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[41] It appears that Mr. Ugale only saw the two sleeves which he cleaned and which were later turned over to the FAA. It is agreed that these two sleeves did not have any gouges or scratches on them.

Of the above mentioned witnesses to the damage, all but three testified that they did not have at any opinion or conclusion as to whether any of the damage they observed exceeded tolerance limits. The investigation did produce three witnesses – Mr. Murata, Mr. Daniel and Mr. Sealy – who all testified that some of the sleeves were out of tolerance. Mr. Murata testified that both of the sleeves he inspected on aircraft 69 were beyond manufacturer's limits for damage. (Murata TR at pp. 50, 51). Mr. Daniel testified that he saw two or three sleeves that he considered out of tolerance. (Daniel TR at pp. 45, 46, 47). Mr. Sealy testified that he considered six of the sleeves on aircraft 68 and 69 to be beyond damage tolerance limits. (Sealy TR at p. 20). This direct evidence is summarized in the following paragraph.

Mr. Murata testified that he looked at two sleeves while they were still on aircraft 69. The first sleeve was badly sanded and he was able to put his fingernail in the cut area which he estimated to be approximately 1/16 inch deep and about 2 inches long. He further testified that the second sleeve was badly galled and that the bearing race (where the tires ride) was also badly galled. (Murata TR at pp. 12, 13). Mr. Murata testified that he was not familiar with the manufacturer's tolerance at the time of his inspection but became familiar with them within the next week. (Murata TR at p. 14). Based on his observations, Mr. Murata was of the opinion that the two sleeves were not within the manufacturer's damage tolerance. (Murata TR at pp. 50, 51). Mr. Murata measured the

cut by placing his fingernail in it and did not ask for or use a micrometer. (Murata TR at p. 52)[42].

Mr. Daniel testified that he was involved in removing the wheels on aircraft 68 and 69. (Daniel TR at pp. 39, 49). He testified that both aircraft had some severely worn sleeves. (Daniel TR at p. 43). One of the sleeves had a vertical cut which appeared to him to have resulted from the removal of a frozen bearing by a pneumatic tool (Daniel TR at pp. 44, 45). Several of the sleeves had gouges and scratches. (Daniel TR at p. 45). One of these had chisel marks apparently the result of someone trying to remove the sleeve. (Daniel TR p. 46). He testified that each of the aircraft had at least one sleeve that was out of tolerance and he thought that one aircraft had two sleeves beyond tolerance. (Daniel TR at pp. 62, 63). Mr. Daniel did not measure any of the sleeves. (Daniel TR at p. 65). He also remembered Mr. Murata looking at one or two sleeves. (Daniel TR at p. 74). Mr. Daniel recalled that the sleeve was badly gouged where it rests on the axle with the width of the gouge being approximately 1 inch. (Daniel TR at p. 74). He agreed that this sleeve was out of tolerance and shared this opinion with Mr. Murata. (Daniel TR at p. 75). Mr. Daniel was aware of the damage limits per the manufacturer's manual. (Daniel TR at pp. 31, 32).

Mr. Sealy testified that he observed six sleeves that had damage which in his opinion exceeded the manufacturer's tolerance. (Sealy TR at p. 20). He was aware of the

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[42] Mr. Murata's description of the damage was from his memory. He did not include a description of the damage in his notes. (Murata TR at p. 52).

tolerance limits and produced a copy of the pertinent manual pages at his deposition. (Sealy Deposition FAA Exhibit 2; Sealy TR at p. 22). Mr. Sealy testified that, based on experience, you could usually tell if a crack was beyond the tolerance limit of five thousandth of an inch – if you could see the gouge then it would be greater than that tolerated. (Sealy TR at pp. 53, 54). He testified that he did not run any dye penetrant test on the sleeves or personally measure them. (Sealy TR at p. 43). Mr. Sealy recalled that Mr. Murata looked at three sleeves and that these were three of the six damaged sleeves he considered out of tolerance. (Sealy TR at p. 24).

The above testimony indicates that from two (Murata) to six (Sealy) sleeves were damaged beyond tolerance. The two sleeves observed by Mr. Murata can be specifically identified as the number 1 and number 2 axle sleeves on aircraft 69. Mr. Ikezawa testified that the two sleeves he inspected and entered on the HAL Forms 46 were the same sleeves that Mr. Murata looked at (Ikezawa TR at p. 24)[43]. FAA Exhibits 2 and 3 to the Ikezawa deposition establish that these were the sleeves on axles 1 and 2 on aircraft 69. It is concluded that these are the only two sleeves that can be specifically be identified for which there is evidence of damage beyond tolerance. Mr. Daniel was not certain which aircraft the sleeve with the die cut was on and could only indicate that each aircraft had at least one sleeve out of tolerance. (Daniel TR at pp. 62, 66). Mr. Sealy could not identify which damaged sleeves were on which aircraft.

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[43] Mr. Murata likewise testified that Mr. Ikezawa was present when he arrived to look at the aircraft. (Murata TR at p. 10).

In evaluating the above evidence, the following points are considered pertinent. As mentioned previously, there is no scientific evidence concerning the degree of damage. The sleeves were destroyed that weekend and were not tested or measured at that time due primarily to HAL instructions that the sleeves be replaced if there was any damage. In this regard, HAL management conceded that they did not know whether any of the removed sleeves were beyond tolerance. (Wells TR at p. 60; Ogden TR at p. 36). As to the two sleeves viewed by Mr. Murata, all three witnesses – Mr. Murata, Mr. Daniel and Mr. Sealy – agreed that those sleeves were out of tolerance. In addition, Mr. Ikezawa's description of the damage for these sleeves is similar to Mr. Murata's testimony[44]. The investigation revealed no conflicting testimony on this point and, therefore, witness credibility should be determined based on the background of the witnesses and the consistency of the testimony with not only other testimony but also on its overall technical reliability and accuracy[45]. As to the additional alleged

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[44] Mr. Ikezawa described the number 1 axle sleeve as follows: "Wear Gouges On Lower Half of Sleeve." (Ikezawa Deposition FAA Exhibit 3).

He described the damage on the number 2 axle sleeve as follows: "#2 Axle Sleeve Evidence of Axle Sleeve Reworked – (Grinded)." (Ikezawa Deposition FAA Exhibit 2).

[45] Mr. Murata has impressive credentials in the field of aircraft maintenance as reflected on pages 4 and 5 of his deposition. Mr. Daniel also appears to be a well qualified mechanic and also has extensive experience in other machine work. (Daniel TR at pp. 9, 10, 11). In this connection, Mr. Nitta considered him a competent mechanic and indicated he never had any real problem with him. (Nitta TR at p. 37). Prior to working for HAL,

unacceptable sleeves testified to by Mr. Daniel and four additional sleeves testified to by Mr. Sealy, no corroborating evidence was obtained.

Finally, there is additional investigation beyond the scope of this inquiry which could result in further evidence to either support or contradict the testimony of Mr. Murata, Mr. Daniel and Mr. Sealy on this issue. First, Mr. Daniel testified that he had examined the allegedly damaged sleeve on aircraft 70 and that the sleeves observed by Mr. Murata were similar to, if not worse than, the sleeves on aircraft 70. (Daniel TR at p. 70). At an appropriate time, the data regarding the sleeve taken from aircraft 70 could be examined and analyzed to see if it would shed any light on the condition of the sleeves from aircraft 69. Secondly, expert information and opinion could be sought on the issue of whether a scratch or gouge readily visible and for which a fingernail could be inserted would likely or definitely exceed the .005 inch tolerance limit.

As to the third issue of whether there were any violations of Sections 43.13 or 121.153(a)(1) of the Federal Aviation Regulations, it is concluded that the existence of damage on the sleeves beyond the tolerance limits set forth in the manufacturer's manual would result in the aircraft not being in an airworthy condition and not

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Mr. Sealy worked for eight years for Douglas Aircraft Corporation building DC-9 and DC-10 aircraft. (Sealy TR at p. 12). On balance, both Mr. Murata and Mr. Daniel were considered to be credible witnesses. In addition to the credibility point previously discussed, Mr. Sealy's testimony did differ as to certain details from that of the other witnesses.

meeting all airworthiness requirements. Similarly, the aircraft would not be at least equal to its original or properly altered condition. This is based on the fact that the sleeve preforms [sic] a direct safety function in protection of the axle from damage from a frozen bearing. A sleeve with damage exceeding that described in the Douglas Manual would both be not equal to its original or properly altered condition and not maintained in accordance with the manufacturer's requirements but also could result in a catastrophic failure of the landing gear and wheel itself.

The above discussion as to the nature of the damage to the sleeves constitutes the first part of the question of whether the evidence indicates any violations of the Federal Aviation Regulations in connection with the sleeves. In addition, each of these regulations involves separate individual subissues. In order to violate Section 121.153(a)(1), it is necessary that the aircraft be operated. Attachment 2 contains information concerning the operation of the aircraft prior to September 18, 1987. However, while we know when the aircraft was operated, there was no direct evidence uncovered by the investigation as to the condition of the sleeves on any one of these particular flights. In other words, there was no testimony obtained which indicated that the sleeve was observed to be damaged on a particular date prior to September 18, 1987, nor was this information contained in any of the records examined. Here again, additional expert analysis and opinion beyond the scope of this investigation may furnish pertinent circumstantial evidence. I am specifically referring to the issue of the duration of time in which the damage to the sleeves could reasonably be expected to

occur during the operation of the aircraft. As discussed previously, the evidence indicates that the damage to the two sleeves on aircraft 69 (as well as the damage to the other sleeves) could not have resulted from the removal of the sleeves on the weekend of September 18, 1987, as the sleeves were still on the aircraft when they were observed by the witnesses. It is also noted that the aircraft flew on numerous flights on the days immediately prior to the inspection and removal (see Attachment 2).

The question of whether there was a violation of Section 43.13 also raises a separate subissue. Section 43.13(a) and (b) pertain to persons performing maintenance, alteration or preventive maintenance on an aircraft, engine, propeller or appliance. Thus, an essential element of any violation of that section requires that maintenance, preventive maintenance or alteration have been performed by the alleged violator. Maintenance is defined as meaning:

> inspection, overhaul, repair, preservation, and the replacement of parts, but excludes preventive maintenance. (14 CFR Section 1.1).

From this definition, it is evident that the inspection of the sleeves by an airline mechanic or inspector would constitute maintenance.

The testimony indicated that the inspection of the sleeves is not specifically required in the manufacturer's manual to be performed at a particular time. The Douglas DC-9 Maintenance Manual covering maintenance practices for the DC-9 Main Gear wheel and Tire Assembly does not specifically call for the inspection of the sleeve itself. The manual does call for an inspection of the axle

for damage. (Ogden TR at p. 30; Ogden Deposition FAA Exhibit 5, pp. 202, 203). The manual also provides specific guidance in a later part as to how to conduct an inspection or check of the sleeve. (Ogden Deposition FAA Exhibit 6).

The testimony of the witnesses indicates that the inspection of the sleeve would be considered a normal routine mechanic's inspection. (Ogden TR at p. 23). There was some differences of opinion as to when this inspection should be accomplished. Some witnesses testified that it should be done when replacing a tire (Nitta TR at p. 36; Sonstein TR at p. 19; Kam TR at p. 23) whereas others did not feel that the replacement of the tire would involve an inspection of the sleeve (Omoto TR at p. 33; Mihara TR at p. 35). It was generally agreed that the sleeve should be inspected anytime the wheel or brake assemblies are replaced or where there is indication of a seized bearing. (Ogden TR at p. 23; Mihara TR at pp. 35, 36; Ikezawa TR at p. 30; Katano TR at pp. 37, 38).

There was no direct testimony given during the investigation which indicated the existence of any damaged sleeves prior to September 18, 1987. I did obtain all of the HAL Forms 46 which referred to axle assemblies for aircraft 68 and 69 from the period from May 1, 1987 through September 17, 1987, and these were introduced and attached to the depositions of the pertinent HAL inspectors and mechanics. Attachment 6 contains a list of these exhibits. Among the more recent forms (in relation to September 18, 1987) is a form indicating that the number 1 tire assembly on aircraft 69 was replaced on August 13, 1987. (Mihara Deposition FAA Exhibit 6, p. 6). Other records show work being done on aircraft 68 on

September 6, 1987, and on the number 4 axle on aircraft 69 on September 8, 1987. (Estano Deposition FAA Exhibit 5, p. 4; Mihara Deposition FAA Exhibit 6, p. 7).

As with the issue involving Section 121.153(a)(2), the obtaining of expert review and opinion as to how long the conditions described by Mr. Murata, Mr. Daniel and Mr. Sealy could reasonably have been expected to exist would be pertinent to the issue of whether there were any violation of the section.

[p. 112] IN THE CIRCUIT COURT
OF THE FIRST CIRCUIT
STATE OF HAWAII

GRANT T. NORRIS, Plaintiff, vs. HAWAIIAN AIRLINES, INC., Defendant.	)	CIVIL NO. 87-3894-12 VOLUME 2

CONTINUED DEPOSITION OF NORMAN MATSUZAKI,

Taken on behalf of Plaintiff at the offices of Cades Schutte Fleming & Wright, 1000 Bishop Street, 11th Floor, Honolulu, Hawaii, 96813, commencing at 10:45 a.m. on Monday, June 26, 1989.

REPORTED BY: JOAN IZUMIGAWA, CSR No. 136
Notary Public, State of Hawaii

* * *

[p. 164] take it that you obtained that information from Mr. Culahara. Is that accurate?

MR. RICKTENWALD: I'll object that that misstates his testimony.

A I'm not sure, and I don't remember.

Q (By Mr. Boyle) Okay. Well, is there anybody who was present who could have possibly given you that information other than Mr. Culahara?

MR. RICKTENWALD: Calls for the witness to speculate.

A I wouldn't know.

Q (By Mr. Boyle) Well, then how did you know that "all we requested was his signature on what he exactly did"?

MR. RICKTENWALD: Asked and answered.

A I believe I stated before that all I – all management requested was for him to sign off work which he actually did. And if there was any – if there was anything contrary to it he didn't like, he can put an asterisk there and put down whatever he was entitled.

Q (By Mr. Boyle) What did he actually do?

A He was assigned to do whatever maintenance that was supposed to be done. I'm not sure whether the work to be – the work that had to be done had been written up in advance on a company form or what.

* * *

[p. 1] IN THE CIRCUIT COURT
OF THE FIRST CIRCUIT
STATE OF HAWAII

GRANT T. NORRIS, Plaintiff, vs. HAWAIIAN AIRLINES, INC., Defendant.	)	CIVIL NO. 87-3894-12 VOLUME 1

DEPOSITION OF JUSTIN CULAHARA,

Taken on behalf of plaintiff at the offices of Cades Schutte Fleming & Wright, 1000 Bishop Street, 11th Floor, Honolulu, Hawaii, 96813, commencing at 9:40 a.m. on Wednesday, June 28, 1989.

REPORTED BY: JOAN IZUMIGAWA, CSR No. 136
Notary Public, State of Hawaii

* * *

[p. 137] Q What happened next?

A Okay. Then I seen Norris come over, because apparently about that time the tire change was already completed. The tire installation was completed, with three guys on over there. So he came over there. So since he walked over to me, I pointed out to Norris, I says, "Norris, would you sign off the tire change on Number 2 engine?" I mean Number 2 tires.

He says – to the best of my recollection, his answer was, "You seen what I showed you," or something to that effect. "You seen what it is."

So I told him, "No, you just sign off for the work that you have completed." I says, "I will take care the sleeve with Mr. Wong. We're going to carry it over. We dye-checked it, we looked at it. We're satisfied with it. We're going to carry it over. I want you to sign off for only the work you have completed."

And his answer to me – and he says – he kept reverting back. Of course, there were words exchanged. He keep coming back and says, "No, I'm going – you seem what it looks like."

I told – I can back again, says, "I – just sign off the work that you did, the tire change."

He said, "Ah, I'm not going to sign off."

So I says, "You telling me you refuse to sign [p.138] off the work you completed?"

He said, "Yes."

So I says, "Well, if you do – I'm ordering you at this point in time to sign off for only the work you performed."

And he says, "No. Do whatever you have to do."

So I says, "Okay. As of this point in time, you are suspended."

Then Mr. Sealy proceeded to walk over where we were. So I grabbed Mr. Sealy and told Mr. Sealy – and explained to Mr. Sealy what I had done to Mr. Norris.

And I told Mr. Sealy and I explained to him that, "Look, Sealy. I just" – I had just suspended Norris for refusing to sign off his work for his work performed on that – on that tire change. And I explained to him that, "The sleeve portion, you need not have to worry, for I and Mr. Wong will carry it over because we had pulled a dye check on it and we both satisfied with it." And I says, "If you and I can sign if off, no problem."

And Mr. Sealy concurred with me. He signed the – he walked over, he signed it off, and I put my name next to his. We put the – we put down here the tire, the serial number, off and on.

And that's all that was said.

MR. BOYLE: That was a lengthy answer. May I

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

GRANT T. NORRIS, Plaintiff, vs. HAWAIIAN AIRLINES, INC., Defendant.	)	CIVIL NO. 87-3894-12 AFFIDAVIT OF THOMAS YAMACHIKA

AFFIDAVIT OF THOMAS YAMACHIKA

STATE OF HAWAII)
) SS:
CITY AND COUNTY OF HONOLULU)

THOMAS YAMACHIKA, being first duly sworn, states:

1. I am an attorney with Cades Schutte Fleming & Wright, counsel for Plaintiff Grant T. Norris.

2. Exhibit A is a true and correct copy of an affidavit of Grant T. Norris, with attached exhibits, that was filed in Civil No. 88-00010 HMF in the United States District Court, District of Hawaii ("Federal Action"). A current affidavit to be filed in this action has been sent to Mr. Norris and will be filed prior to the hearing on this motion.

3. Exhibit B is a true and correct copy of a transcript from an arbitral hearing that this office obtained from the International Association of Machinists.

4. Exhibits C-1 through C-4 are true and correct color xerox copies of photographs taken of the axle sleeve taken off Aircraft 70 (N709HA). The photographs were taken on May 20, 1988, at a deposition upon written interrogatories at which I was present. The photographs accurately reflect the condition of the axle sleeve on that date.

5. Exhibits D and E are true and correct copies of letters from the FAA. Copies of these letters were produced by Defendant.

6. Exhibit G is a true and correct copy of an Order of Investigation issued by the FAA.

7. Exhibits H and I are true and correct copies of decisions and orders filed in the Federal Action.

8. Exhibit J is a true and correct copy of an order entered by the United States Court of Appeals, Ninth Circuit.

Further affiant sayeth naught.

/s/ Thomas Yamachika
THOMAS YAMACHIKA

Subscribed and sworn to before me
this 1st day of August, 1989.

/s/ Judy Kay Fur
Notary Public, State of Hawaii

My commission expires:
2/21/91

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

GRANT T. NORRIS, Plaintiff, vs. HAWAIIAN AIRLINES, INC., Defendant.	)	CIVIL NO. 87-3894-12 AFFIDAVIT OF EDWARD deLAPPE BOYLE

AFFIDAVIT OF EDWARD deLAPPE BOYLE

STATE OF HAWAII)
) SS:
CITY AND COUNTY OF HONOLULU)

EDWARD deLAPPE BOYLE, being first duly sworn, states:

1. I am the attorney for plaintiff.

2. The attached Exhibit "F" is a true and correct copy of a headline article that appeared in the *Honolulu Star-Bulletin*, Hawaii's most widely circulated evening paper, on May 12, 1988.

3. On May 12, 1988, your affiant was interviewed by KGMB-TV, the Hawaii CBS affiliate, in connection with the development mentioned in that newspaper article. Portions of this interview were broadcast as part of the opening story on KGMB-TV's 6:00 p.m. and 10:00 p.m. news telecasts on that date.

4. On May 13, 1988, your affiant was interviewed by KITV-TV, the Hawaii ABC affiliate, in connection with the

same development. Portions of this interview were broadcast on KITV-TV's news telecasts on that date.

5. This affidavit, and the attached exhibit, are offered to evidence the magnitude of local concern over the events that are the subject of this lawsuit.

Further affiant sayeth naught.

/s/ Edward D. BOYLE
EDWARD deLAPPE BOYLE

Subscribed and sworn to before me
this 1st day of August, 1989.

/s/ Judy Kay Fur
Notary Public, State of Hawaii

My commission expires:
2/21/91

EXHIBIT A

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

GRANT T. NORRIS, Plaintiff, vs. HAWAIIAN AIRLINES, INC., Defendant.	)	CIVIL NO. 87-3894-12 AFFIDAVIT OF GRANT T. NORRIS

AFFIDAVIT OF GRANT T. NORRIS

STATE OF HAWAII)
) SS:
CITY AND COUNTY OF HONOLULU)

GRANT T. NORRIS, being first duly sworn, states as follows:

1. I am the plaintiff in this action. I am making this affidavit upon personal knowledge except where stated otherwise.

2. I have been, and still am, a licensed aircraft mechanic with an Airframe and Powerplant ("A&P") rating. One of the inscriptions on the back of my license reads:

REPAIRMAN OPERATIONAL RESTRICTION

The holder hereof shall not perform or approve alterations, repairs or inspections of aircraft except in accordance with the applicable

airworthiness requirements of the Federal Aviation Regulations, or such method, techniques and practices found acceptable to the Administrator.

3. From February 2, 1987 to August 3, 1987, I was employed as a mechanic by defendant Hawaiian Airlines, Inc. ("HAL").

4. In July 1987, my shift typically would start at 9 p.m. at night and end at 5:30 a.m. the next morning.

5. At approximately 3:30 a.m. on July 15, 1987, I was working on HAL's Aircraft 70 (Serial No. N709HA). I was doing a routine preflight inspection on that aircraft, and I noticed that the left No. 2 tire was worn and needed to be changed. I advised the lead mechanic who, after consulting with a HAL inspector, authorized the tire change.

6. When I and other mechanics removed the tire, we discovered that the wheel bearing was frozen or stuck onto the axle sleeve. We had difficulty removing the bearing from the axle sleeve, and we approached the lead mechanic and the inspector for their advice. We continued to be unsuccessful, and at about 4:35 a.m. the Base Maintenance Line Manager personally came over to supervise.

7. We eventually removed the bearing at about 4:45 a.m. I, and the others present, noticed that the axle sleeve was scarred and grooved, with gouges and burn marks clearly visible.

8. An axle sleeve, sometimes called an axle spacer, is an aircraft part that fits snugly around the axle. It is designed to protect the axle from damage. An axle sleeve

normally has an external surface that is so highly polished as to be mirror-like. I know that the reason why the surface is so polished is so that inner race of the wheel bearing that is put on over it will spin freely around the axle sleeve. If the axle sleeve surface is uneven or damaged, the inner bearing race will bind to the axle sleeve, forcing the bearing itself to absorb all of the stress incident to take off or landing.

9. At the time I discovered the damage on July 15, 1987, I did not remember exactly what was the acceptable tolerance for damage specified in the manufacturer's manual. I knew, however, that the tolerance could not have been more than at most a few hundredths of an inch and the damage that I saw clearly exceeded that. I later found out from the FAA that the acceptable tolerance for damage is 0.005 inch.

10. I know that when an aircraft lands, the landing gear wheels will speed up from rest to approximately 150 miles per hour in a fraction of a second. The heat generated by this sudden acceleration, if absorbed by the bearing alone, could be enough to melt the bearing. If that happened, the landing gear could fail. I believed, from the scarring and burn marks on the axle sleeve, that someone had removed what must have been a completely destroyed bearing from this axle sleeve and then installed another bearing over the same sleeve.

11. At that time, there was no doubt in my mind that the part was unsafe and needed to be changed. The mechanic who was working with me on that shift agreed, as did other mechanics who were also present.

12. HAL's Base Maintenance Line Manager (whom I will refer to as the "supervisor") saw the condition of this axle sleeve. The supervisor is responsible for maintaining the published flight schedules. The supervisor had told us that Aircraft 70 was due back on line at 6:30 a.m., which meant that the aircraft had to be out of the barn by 6:00 a.m.

13. The supervisor directed us to hand-sand the rough edges of the axle sleeve and to put a new bearing and tire on over it. At that point, I told the lead mechanic that I did not want to be responsible for reinstalling the tire.

14. Aircraft No. 70 was returned to service and in fact did carry passengers that morning.

15. At about 5:15 a.m., the supervisor approached me and asked me to sign the maintenance record for installation of the No. 2 tire. I told the supervisor that if he could show me in the maintenance manual where it said that the axle spacer was in a satisfactory condition then I would sign. I also said that I, after checking with the lead mechanic, did not actually perform the tire installation but only assisted.

16. The supervisor did not check the manual or allow me to check the manual, but told me that if I did not sign I would be suspended. I said I would not sign. I was not offered the option of signing off on the tire removal only. The supervisor suspended me on the spot, pending a termination hearing.

17. Later that morning, as soon as I got home, I telephoned the FAA to tell them that there was a problem

with Aircraft 70, although I did not say what the problem was.

18. In the late morning or early afternoon of July 15, 1987, after the supervisor had gone off shift, I went back to pick up my tools and then went to the office of HAL'S Assistant Director of Base Maintenance (the "Assistant Director"). While I was waiting for him, I had started to leaf through the maintenance manual, but I did not finish because the Assistant Director arrived and stopped me. The Assistant Director told me that he had heard of the events that had happened earlier that morning. I told him that I had called the FAA.

19. The Assistant Director had written a letter formally advising me that I was charged with insubordination. The Assistant Director did not let me see the maintenance manual. In fact, he literally chased me from his office, saying that whatever I or the Union said, I was "gone."

20. A true and correct copy of the letter I received, along with notations of mine requesting additional time before the hearing and the Assistant Director's acceptance of this request, is attached as Exhibit "1".

21. My termination hearing was held on July 31, 1987. That was a Friday. The decision to discharge me for insubordination was issued the following Monday, August 3, 1987.

22. A true and correct copy of the termination decision is attached as Exhibit "2." The decision indicates that a copy of it was sent to HAL's Vice President for Maintenance and Engineering, Howard Ogden.

23. On September 21, 1987, I received a letter from HAL's Vice President for Maintenance and Engineering. That letter, a true copy of which is attached as Exhibit "3", offered to reinstate me without any back pay for the period since my firing, with an explicit warning that "any further instance of failure to perform your duties in a responsible manner" could result in my getting fired again.

24. When I had gotten the letter, however, I was in California. I was preparing to attend nursing school because I figured that my career in the airline industry had ended.

25. The attached Exhibit "5" is a true and correct copy of the page of my collective bargaining agreement containing Article XV, Paragraph H.

Further affiant sayeth naught.

/s/ Grant T. Norris
GRANT T. NORRIS

Subscribed and sworn to before me
this 5th day of January, 1988.

/s/ Monica G. L. Young
Notary Public, State of Hawaii

My commission expires:
9/29/89

EXHIBIT A

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

GRANT T. NORRIS, Plaintiff, vs. HAWAIIAN AIRLINES, INC., Defendant.	)	CIVIL NO. 87-3894-12 AFFIDAVIT OF THOMAS YAMACHIKA

AFFIDAVIT OF THOMAS YAMACHIKA

STATE OF HAWAII)
) SS:
CITY AND COUNTY OF HONOLULU)

THOMAS YAMACHIKA, being first duly sworn, states as follows:

1. I am an associate with Cades Schutte Fleming & Wright, attorneys for plaintiff.

2. The attached Exhibit "4" is a true and correct copy of a document I obtained from the Union's file on the grievance that Grant T. Norris filed relating to his discharge.

3. The attached Exhibit "6" is a true and correct copy of those pages of the 1987 Hawaii Session Laws containing Act 267, the Hawaii Whistleblowers' Protection Act of 1987.

Further affiant sayeth naught.

/s/ Thomas Yamachika
THOMAS YAMACHIKA

Subscribed and sworn to before me
this 12th day of January, 1988.

/s/ Monica G.L. Young
Notary Public, State of Hawaii

My commission expires: 9/29/89

EXHIBIT A

(LOGO)
HAWAIIAN
AIRLINES

July 15, 1987

/s/ Grant Norris 7/15/87
Letter Received – Date –
Hand Deliver LTR.

Mr. Grant T. Norris
1125A 2nd Avenue, Apt. 4
Honolulu, HI 96816

Dear Sir:

This is to advise you that a hearing will be held on Friday, July 17, 1987 at 10:00 a.m. in the office of the Director of Base Maintenance, H. Honma. The charge is Group I – Violations – Reprimand to Discharge; Item 8 – Insubordination, failure or refusal to obey instructions or perform work as required.

If you and your union representative is not agreeable to this date, feel free to contact me at x 237.

Respectfully,

/s/ N. Matsuzaki
N. Matsuzaki
Hearing Officer

NM:hpa

cc: H. Honma
H. E Ogden
IRD
IAM – Floyd Baptist
J. Chun

EXHIBIT A

(LOGO)
HAWAIIAN
AIRLINES

AUGUST 03, 2987 [sic]

BASE MAINTENANCE & ENGINEERING
JULY 31, 1987
SUSPENSION HEARING

A HEARING WAS HELD IN THE BASE MAINTENANCE OFFICE JULY 31, 1987 AT 10:00 A.M.

REPRESENTING THE UNION: F. BAPTIST

RESPRESENTING [sic]
THE COMPANY: J. CULAHARA

SUSPENDED EMPLOYEE: G. NORRIS – DATE OF HIRE: FEBRUARY 2, 1987

COMPANY OBSERVER: C. ROBINSON

THE HEARING OFFICER PRIOR TO THE START OF THIS HEARING EMPHASIZED THE EMPLOYEE REQUESTED THE LATE SCHEDULED TIME AS STATED ON THE LETTER DATED JULY 15, 1987 NOTIFICATION TO HIM.

QUESTION AT ISSUED:
EMPLOYEE'S REFUSAL TO SIGN WORK RECORDS FOR WORK PERFORMED BY HIM; SUBSEQUENTLY, SUSPENDED FOR INSUBORDINATION AFTER A DIRECT ORDER WAS GIVEN TO DO SO.

POSITION OF UNION:
EMPLOYEE REFUSAL TO SIGN COMPANY WORK RECORD BASED ON; HE FELT IT WAS UNSAFE FOR WORK PERFORMED.

POSITION OF COMPANY:

THE COMPANY IS RESPONSIBLE FOR THE AIRWORTHINESS OF IT'S AIRCRAFT AND THE PERFORMANCE OF MAINTENANCE IN ACCORDANCE WITH IT'S [sic] MANUAL, WHICH MUST ENSURE COMPLIANCE WITH THE FAR'S. ALSO, COMPETENT PERSONNEL, MR. HENRY WONG, QUALITY CONTROL INSPECTOR, WHO IS TECHNICALLY QUALIFIED TO ANALYZE, JUDGE THE MERIT OF EACH ITEM AND MAKE THE DECISION WHETHER OR NOT TO SIGN THE ITEM OFF AS AIRWORTHY.

THE BASE MAINTENANCE LINE MANAGER, MR. JUSTING [sic] CULAHARA, PERSONALLY OBSERVES THIS WORK BEING DONE TO THE EXTENT NECESSARY TO INSURE THAT IT IS BEING DONE PROPERLY. HE IS READILY AVAILABLE IN PERSON FOR CONSULTATION. HE SEES ALL AIRCRAFT IN A CONDITION SATISFACTORY TO INSPECTION SECTION PRIOR TO RELEASE FOR FLIGHT.

IN THIS CASE, THE DECISION IN SIGNING A WORK SHEET SIGNIFY ONLY ITEMS COVERED BY HIS SIGNATURE. THIS WAS THE ONLY REQUISITE IN THIS CASE. A DIRECT ORDER WAS GIVEN AND HIS REFUSAL TO COMPLY BROUGHT ABOUT THIS UNHAPPY SITUATION. MANAGEMENT HAS NEVER MANDATED FOR A "SIGN OFF" FOR WORK NOT DONE BY AN INDIVIDUAL.

DECISION:

MR. GRANT NORRIS TERMINATED AS OF THIS DAY, AUGUST 3, 1987, FOR INSUBORDINATION.

/s/ Norman Matsuzaki
NORMAN MATSUZAKI
ASSISTANT DIRECTOR OF BASE MAINTENANCE
HEARING OFFICER

NM:hpa

cc: GRANT NORRIS
IRD
A.P. WELLS
H.E. OGDEN
C. ROBINSON
H. HONMA
IAM

EXHIBIT A

(LOGO)

HAWAIIAN
AIRLINES

September 10, 1987

Mr. Grant T. Norris
1125-A 2nd Avenue, #4
Honolulu, HI 96816

Dear Mr. Norris:

I have reviewed your case file very carefully and, as the next appropriate individual in the chain of command, I have decided to mitigate the punishment imposed on you from discharge to suspension without pay for the period August 3, 1987 to September 15, 1987.

You are to report to duty on September 15, 1987 at 1930 hours.

This action being taken by me should not be interpreted by you as an indication that the Company condones your conduct. You are hereby warned that any further instance of failure to perform your duties in a responsible manner will result in consideration of more severe disciplinary action to include discharge.

Very truly yours,

/s/ Howard E. Ogden
Howard E. Ogden
Vice President
Maintenance And Engineering

cc: Personnel
Norman Matsuzaki

EXHIBIT A

(LOGO)

HAWAIIAN
AIRLINES

September 14, 1987

Mr. Samson Po'omaihealani
IAMAW District Lodge 141
1449 South Beretania Street
Honolulu, HI 96814

Re: 3rd Step Grievance Hearings
Enos, Palmer and Otoguru

Dear Sam:

This is to follow up on your conversation today with Mary Ellen Sorensen pertaining to subject grievance hearings.

First, please be advised that Grant Norris has been reinstated, which negates the need for a hearing at the third step. Second, October 5, 1987 is agreeable to me for scheduling the third step hearings for Gordon Palmer, Steven Otoguru and Fred Enos. It is my understanding that the Palmer/Otoguru grievances will be heard at 10:00 am with the Enos hearing to follow (at approximately 11:00 am).

In the event HAL does not have a new Director of Industrial Relations on board, we may want to request a delay as none of these cases involves a discharge.

In any case, all hearings will take place in the HAL conference room at 1164 Bishop Street, Suite 800. Your kokua is appreciated.

Sincerely,

/s/ Stephen R. Thompkins
Stephen R. Thompkins
Vice President-Administration
and Counsel

cc: D. Glover
B. Perry
G. Fleming

EXHIBIT A

IAM MECHANICS AGREEMENT

ARTICLE XV – GRIEVANCE PROCEDURE (Continued)

E. Necessary hearings and investigations called by the Company shall, insofar as possible, be conducted during regular business hours, and stewards and Local Committeemen and necessary witnesses shall not suffer loss of normal pay while attending such hearings or investigation.

F. 1. No employee covered by this Agreement shall be discharged or suspended without pay from the service without a prompt, fair and impartial hearing and may be represented and assisted at such hearing by Union representatives. A member of the Local Committee will be notified within two (2) hours from the time an employee is held out of service of the reason for such action. Within forty-eight (48) hours (excluding Saturdays, Sundays and holidays) after such verbal notification, the Union and the employee will be advised in writing of the exact charges against the employee. No later than five (5) days after the employee receives the formal written charges against him, a hearing, as noted above, will be held at a place designated by the Company at a mutually agreed date and time to determine final disciplinary action.

2. An employee who is to be questioned by Company representatives in the investigation of an incident which may result in disciplinary action being taken against him may request a Union representative to be present as an observer. The above does not apply to

inquiries of employees by supervisors in the normal course of their work.

G. An employee dissatisfied with the action of the Company in disqualifying, suspending or discharging him may appeal from such action by filing an appeal to the second step of the grievance procedure as provided for in this Agreement, and a hearing shall be held within five (5) days of submitting such appeal. Oral and written evidence may be introduced at such hearings, and witnesses may be required to testify under oath. All decisions by Company representatives and all appeals filed by the employee or Union shall be in writing and shall conform to the time limitations set forth in the second step of the grievance procedure.

H. If as a result of any hearing or appeals therefrom it is found the suspension or discharge was not justified, the employee shall be reinstated without loss of seniority and made whole for any loss of pay he suffered by reason of his suspension or discharge, and his personnel records shall be corrected and cleared of such charge. If a suspension rather than discharge results, the employee shall have that time he has been held out of service without pay credited against his period of suspension. In determining the amount of back wages due an employee who is reinstated as a result of the procedures outlined in this Agreement, the maximum liability of the Company shall be limited to the amount of normal wages he would have earned in the service of the Company had he not been discharged or suspended.

* * *

EXHIBIT A

ACT 267 H.B. NO. 5

A Bill for an Act Relating to the Whistleblowers' Protection Act. *Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

"CHAPTER
WHISTLEBLOWERS' PROTECTION ACT

§ -1 Definitions. As used in this chapter:

"Employee" means a person who performs a service for wages or other remuneration under a contract for hire, written or oral, express or implied. Employee includes a person employed by the State or a political subdivision of the State.

"Employer" means a person who has one or more employees. Employer includes an agent of an employer or of the State or a political subdivision of the State.

"Person" means an individual, sole proprietorship, partnership, corporation, association, or any other legal entity.

"Public body" means:

(1) A state officer, employee, agency, department, division, bureau, board, commission, committee, council, authority, or other body in the executive branch of state government;

(2) An agency, board, commission, committee, council, member, or employee of the legislative branch of the state government;
(3) A county, city, intercounty, intercity, or regional governing body, a council, special district, or municipal corporation, or a board, department, commission, committee, council, agency, or any member or employee therof;
(4) Any other body which is created by state or local authority, or which is primarily funded by or through state or local authority, or any member or employee of that body;
(5) A law enforcement agency or any member or employee of a law enforcement agency; or
(6) The judiciary and any member or employee of the judiciary.

§ -2 Discharge of, threats to, or discrimination against employee for reporting violations of law. An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:

(1) The employee, or a person acting on behalf of the employee, reports or is about to report to a public body, verbally or in writing, a violation or a suspected violation of a law or rule adopted pursuant to law of this State, a political subdivision of this State, or the United States, unless the employee knows that the report is false; or
(2) An employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

§ -3 Civil actions for injunctive relief or damages. (a) A person who alleges a violation of this chapter may bring a civil action for appropriate injunctive relief, or actual damages, or both within ninety days after the occurrence of the alleged violation of this chapter.

(b) An action commenced pursuant to subsection (a) may be brought in the circuit court for the circuit where the alleged violation occurred, where the complainant resides, or where the person against whom the civil complaint is filed resides or has a principal place of business.

(c) As used in subsection (a), "damages" means damages for injury or loss caused by each violation of this chapter, including reasonable attorney fees.

§ -4 Remedies ordered by court. A court, in rendering a judgment in an action brought pursuant to this chapter, shall order, as the court considers appropriate, reinstatement of the employee, payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies. A court may also award the complainant all or a portion of the costs of litigation, including reasonable attorney's fees and witness fees, if the court determines that the award is appropriate.

§ -5 Penalties for violations. (a) A person who violates this chapter shall be fined not more than $500 for each violation.

(b) A civil fine which is ordered pursuant to this chapter shall be deposited with the director of finance to the credit of the general fund of the State.

§ -6 Collective bargaining and confidentiality rights, takes precedence. (a) This chapter shall not be construed to diminish or impair the rights of a person under any collective bargaining agreement, nor to permit disclosures which would diminish or impair the rights of any person to the continued protection of confidentiality of communications where statute or common law provides such protection.

(b) Where a collective bargaining agreement provides an employee rights and remedies superior to the rights and remedies provided herein, contractual rights shall supersede and take precedence over the rights, remedies, and procedures provided in this chapter. Where a collective bargaining agreement provides inferior rights and remedies to those provided in this chapter, the provisions of this chapter shall supersede and take precedence over the rights, remedies, and procedures provided in collective bargaining agreements.

§ -7 Compensation for employee participation in investigation, hearing or inquiry. This chapter shall not be construed to require an employer to compensate an employee for participation in an investigation, hearing, or inquiry held by a public body in accordance with section -2 of this chapter.

§ -8 Notices of employee protections and obligations. An employer shall post notices and use other appropriate means to keep the employer's employees informed of their protections and obligations under this chapter.

§ -9 conflict with common law, precedence. The rights created herein shall not be construed to limit the

development of the common law nor to preempt the common law rights and remedies on the subject matter of discharges which are contrary to public policy. In the event of a conflict between the terms and provisions of this chapter and any other law on the subject the more beneficial provisions favoring the employee shall prevail."

SECTION 2. If any provision of this Act, or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 3. This act shall take effect upon its approval.

(Approved June 24, 1987.)

EXHIBIT B

In the Matter of The Arbitration between INTERNATIONAL ASSOCIATION OF MACHINIST AND AEROSPACE WORKERS on behalf of DANA FELLER,	)	IAM Grievance No. M87-0003
Grievant,	)	
vs.	)	
HAWAIIAN AIRLINES INCORPORATED,	)	
Employer,	)	

The above-entitled matter came on for hearing at 1164 Bishop Street, 8th Floor, Honolulu, Hawaii, commencing at 9:10 a.m., on Wednesday, December 30, 1987.

BEFORE:

CHARLES R. BOCKEN, ARBITRATOR

APPEARANCES:

For the Grievant: SAMSON POOMAIHEALANI
International Association of Machinists and Aerospace Workers
District Lodge 141
1449 South Beretania Street
Honolulu, Hawaii 96814

For the Employer: STEPHEN R. THOMPKINS, ESQ.
Hawaiian Airlines
P. O. Box 30008
Honolulu, Hawaii 96820

* * *

[p. 99] A When you finish job, you sign off the paperwork concerning that particular aircraft and you go home.

Q Do you know who Justin Culahara is?

A Yes, sir.

Q Could identity [sic] him?

A Blue shirt.

MR. POOMAIHEALANI: The record should show that he recognized who Mr. Culahara is.

Q Has he forced you to work overtime?

A Yes, sir.

Q And on each occasion when you were forced, you did comply with that demand?

A Yes, sir, I did.

Q During your employment with Hawaiian, while you were under the jurisdiction of Mr. Culahara, have you witnessed or have you personally been threatened by him?

A Yes, sir.

MR. THOMPKINS: I'll object. I still don't see the relevance in this line of questioning.

THE ARBITRATOR: I'll let it go. Go ahead, you can answer the question.

Q (By Mr. Poomaihealani) What was the threat?

A On the morning that Mr. Norris was suspended for –

MR. THOMPKINS: Object. Can you talk about the time frame? Can you tell us when specifically?

[p. 100] THE WITNESS: Like dates? July 15.

MR. THOMPKINS: What year?

THE WITNESS: '87.

MR. THOMPKINS: I'll object to that. There's simply no bearing to any matters which occurred in April of this year pertaining to the grievant in this case.

THE ARBITRATOR: Well, I guess he raised the issue and whether it has merit or not, he raised the issue that he was fearful of going back and was apprehensive about going back as a result of the call on the telephone, because of the angry tone.

I'll let it continue for a little while.

Go ahead. You may answer.

Q (By Mr. Poomaihealani) What transpired in that incident?

A On July 15th?

Q Yes.

A Well, when Mr. Norris had refused to sign off a work form because he felt that the aircraft was unsafe, Mr. Culahara suspended him for insubordination because of his refusal to sign. And a few moments after Norris had left the premises, Mr. Culahara came to me and said, "You see what I just did to Norris? I'll do the same if you do not sign."

And I was apprehensive. I didn't want to sign it [p. 101] myself because that sleeve was damaged way

beyond tolerances and I didn't want to sign it because, like I said, I felt it was unsafe, and being on my 90-day probation, I figured I didn't have any right of any kind. So then before I agreed to sign it, Mr. Culahara said he would put his employee number on the form next to mine.

So then I agreed then to put my signature or my employee number, excuse me, on the form. And then about a month and a half later, I guess, I got a letter from the FAA saying they were investigating me – I mean investigating a violation done by me signing off a form that wasn't, you know – they said that it was unairworthy. And they were wanting to know why I signed off this form when I knew that the aircraft was unsafe.

And I told them –

MR. THOMPKINS: I'm going to have to interject. Again, we're talking about threats involving personal safety and I see none of that here. He's talking about requirements and performing work instructions provided by the Company. And it has no relevance whatsoever on Mr. Feller's decision to stay at home and not wanting to come back to work. There's no relevance.

THE ARBITRATOR: I see what you –

MR. THOMPKINS: Absolutely no relevance.

THE ARBITRATOR: But I understand.

[p. 102] So we can stop this line of questioning.

MR. POOMAIHEALANI: No further questions.

THE ARBITRATOR: All right, thank you.

MR. POOMAIHEALANI: We have nothing further to add. No witnesses.

MR. THOMPKINS: We have no further witnesses.

THE ARBITRATOR: You don't want to have any rebuttal?

MR. THOMPKINS: Well, I'd like to have a short recess.

THE ARBITRATOR: Sure, fine.

(A recess was taken.)

MR. POOMAIHEALANI: I forgot to submit into evidence, Mr. Bocken, a packet of some background on the character of the grievant. And it contains an honorable discharge from the United States Air Force; a certificate of training from the Air Force for Course 7, motorcycle challenges; an honorable discharge from the United States Coast Guard as a Boatswain's Mate, Second Class; a Certificate of training from the United States Coast Guard for Boatswain's Mate Third Class. A certificate of training from the Coast Guard for Boatswain's Mate Third Class.

A University of Hawaii associate's degree, good conduct award from the United States Coast Guard, an Order of the Arrow from the Eagle Scout, and a citation as a Pro

* * *

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

I, Jeanne O. Sumida, Notary Public, State of Hawaii, do hereby certify:

That I was acting as shorthand reporter in the foregoing matter on December 30, 1987.

That the foregoing proceedings were taken down in machine shorthand by me to the best of my ability at the time and place stated herein, and were thereafter reduced to typewriting under my supervision;

That the foregoing is a true and correct transcript of the proceedings had in the foregoing matter and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that I am not attorney for any of the parties hereto, nor in any way interested in the outcome of the cause named in the caption.

Dated at Honolulu, Hawaii, this 14th day of January, 1988.

/s/ Jeanne O. Sumida
NOTARY PUBLIC, STATE OF HAWAII

My Commission expires
November 4, 1988.

EXHIBIT C-1

EXHIBIT C-2

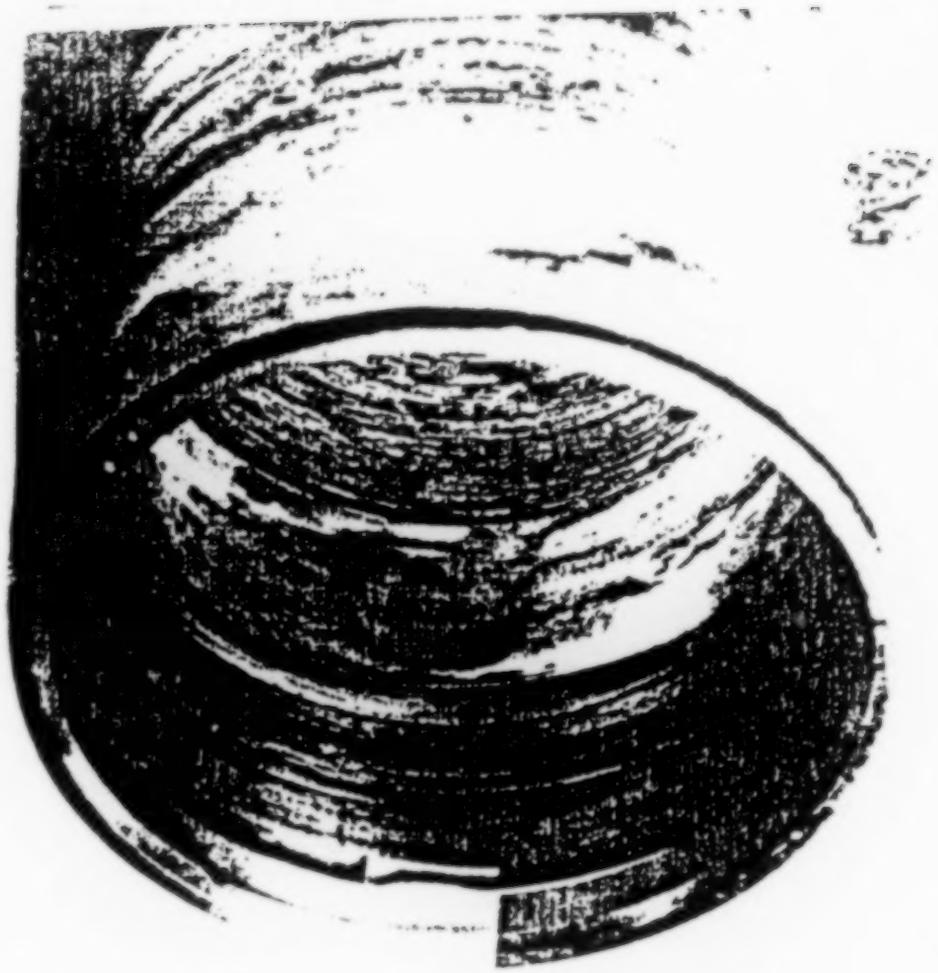

EXHIBIT C-3

EXHIBIT C-4

EXHIBIT D

[LOGO]

Western Pacific Region

US Department
of Transportation

Federal Aviation
Administration

PO Box 92007
Worldway Postal Center
Los Angeles CA 90009

Case No. 87WP130109

MAR 02 1988

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Hawaiian Airlines, Inc.
1164 Bishop Street, 8th Floor
Honolulu, Hawaii 96813

Dear Sirs:

We have received a report of investigation from which it appears that your company, the holder of Air Carrier Operating Certificate No. 5, violated the Federal Aviation Regulations, as indicated below.

On May 27, 1987, your company's personnel performed maintenance on a Douglas DC-9-51 aircraft, Registration No. N709HA, by replacing the wheel, brake and bearing assemblies on the No. 2 main landing gear wheel. During the maintenance, your company's mechanics reported to their supervisor that the axle spacer (sleeve) assembly was damaged. They were directed by the Line Maintenance Manager to replace the wheel, brake, and bearing assemblies but not to replace the damaged sleeve assembly since a separate discrepancy report would be made. No such report was made, and the aircraft was returned to service without replacement of the sleeve assembly.

On June 12, 1987, the No. 2 wheel and bearing assemblies were replaced but the sleeve assembly was not replaced or repaired.

On July 4, 1987, the No. 2 tire and bearing assemblies were replaced but the sleeve assembly was not replaced or repaired.

On July 15, 1987, the No. 2 tire assembly was replaced but the sleeve assembly was not repaired or replaced. The mechanic who performed the tire assembly replacement refused to sign off the work performed because of the damaged sleeve assembly. He was directed by your company's management personnel to do so but refused to comply. He was subsequently terminated from employment from your company for insubordination.

On July 23, 1987, the No. 2 tire and bearing assemblies were replaced but the sleeve assembly was not replaced or repaired.

On July 31, 1987, the No. 2 brake and bearing assemblies were replaced but the sleeve assembly was not repaired or replaced.

The damaged sleeve assembly was finally replaced on August 4, 1987. On that date, an FAA Inspector inspected the damaged sleeve assembly and found it to be in the following condition:

1. The spacer was badly scored.
2. The center area of the spacer appeared to have been hit numerous times with a heavy metal object.
3. There were 4 or 5 deep gouges on the spacer.

4. The overall damage was beyond allowable repair limits set out in the manufacturer's maintenance manual.

Between May 27, 1987 and August 4, 1987, your company operated Aircraft N709HA with the damaged sleeve for 65 days and on 958 flights.

The operation of the aircraft with the damaged sleeve made the aircraft unairworthy. Moreover, the aircraft was at least potentially unsafe because of the potential of hazard of the No. 2 wheel seizing or falling off during takeoffs and landings.

Based on this information, it appears that you company violated Sections 121.153(a)(2) and 43.13 of the Federal Aviation Regulations and is subject to a civil penalty under Section 901(a) of the Federal Aviation Act of 1958, as amended, in an amount not to exceed $1,000.00 for each such violation.

Upon consideration of all the facts and circumstances contained in the report, we would be unwilling to settle this case for any sum less than $964,000.00. In order to give your company an opportunity to submit such an offer in compromise, we will take no further action for a period of fifteen (15) days subsequent to your receipt of this letter.

The enclosed statement explains the procedure followed in cases of this type.

Sincerely,

/s/ DeWitte T. Lawson, Jr.
DeWITTE T. LAWSON, JR.
Regional Counsel

Enclosure

FEDERAL AVIATION ADMINISTRATION

INFORMATION REGARDING CIVIL PENALTIES UNDER THE FEDERAL AVIATION ACT OF 1958

Section 901(a) of the Federal Aviation Act of 1958 provides that any person who violates pertinent provisions of the Act, or any rule, regulation or order issued thereunder, shall be subject to a civil penalty of not to exceed $1,000.00 for each violation. However, the Act authorizes the Administrator to compromise such penalties. The attached letter states the sum which we would accept in full settlement of the alleged violation or violations therein. If you prefer to settle this matter on the basis of the compromise suggested in the attached letter, *such a settlement will not constitute an admission of guilt.*

You are, of course, not required to make an offer of settlement. If you do not wish to make such an offer, the matter will be presented to a United States Attorney, who may bring a civil action, seeking a civil penalty in the full amount of $1,000.00 for each alleged violation. The United States District Court will decide all issues of fact and law, following a trial at which you will have the right to present evidence on your behalf and cross-examine the Administrator's witnesses.

You may, therefore, within fifteen (15) days from the receipt of this letter, proceed in one of the following ways:

1. You may submit the amount suggested in the attached letter by *certified check* or *money order,* payable to the *Federal Aviation Administration.*

2. You may submit additional information which you believe will either explain, excuse, or disprove the alleged violations. You may do so in writing or in person by requesting an informal conference at the Office of the Regional Counsel. Any additional information submitted by you will be given our careful consideration. Since the attached letter may become a part of the public docket, you may wish to submit a statement which would be included in the public docket. Statements or letters submitted by you will be included in the public docket only if you specifically request that they be so included; or

3. You may wish to have the issues of fact and law in this matter decided by the United States District Court. if so, please advise us immediately.

All correspondence in this matter should be addressed to:

Regional Counsel
Federal Aviation Administration
Post Office Box 92007, Worldway Postal Center
Los Angeles, California 90009
Telephone: (213) 297-1270

EXHIBIT E

[LOGO]

Western-Pacific Region

US Department of Transportation

Federal Aviation Administration

PO Box 92007
Worldway Postal Center
Los Angeles CA 90009

Case No. 87WP130101

FEB 25 1988

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

TO: JUSTIN TONY CULAHARA
2365 Apoepoe Street
Pearl City, Hawaii 96782

NOTICE OF PROPOSED CERTIFICATE ACTION

Notice is hereby given that, upon consideration of our report of investigation, it appears that:

1. You are now, and at all times mentioned herein were, the holder of Mechanic Certificate No. 1561742.

2. At all times mentioned herein you were the Line Maintenance Manager for Hawaiian Airlines, Inc. at its main maintenance base at Honolulu, Hawaii.

3. On or about July 15, 1987, Hawaiian Airlines' maintenance personnel, Mr. John Daniels, Mr. Grant Scott, and Mr. Thomas C. Sealy, performed maintenance on a Hawaiian Airlines' Douglas DC-9-51 aircraft, Registration No. N709HA, by replacing the No. 2 main landing gear wheel tire.

4. During this maintenance, the maintenance personnel discovered that the No. 2 MLG axle spacer (sleeve) was damaged and needed to be replaced.

5. The replacement of the sleeve was discussed with you, you inspected the sleeve, and you decided that it did not need to be replaced.

6. You advised the maintenance personnel not to change the sleeve but to hurry up and change the tire since the aircraft was needed for service.

7. The maintenance personnel commenced to test the condition of the sleeve, using a dye test.

8. You ordered the dye test to be discontinued, and you stated that the aircraft was needed to be moved right away to the terminal for service.

9. Mr. Norris refused to sign off the aircraft maintenance records because of the condition of the sleeve.

10. You then terminated his employment with Hawaiian Airlines.

11. You then threatened Mr. Sealy with terminating his employment if he did not sign the maintenance records.

12. You then initialed off on Hawaiian Airlines' Form 46 clearing the discrepancy, and returning the aircraft to service.

13. No maintenance was performed to repair or replace the damaged sleeve.

14. The damaged sleeve made the aircraft unairworthy.

By reason of the foregoing circumstances, you

a. violated Section 43.13(a) of the Federal Aviation Regulations, in that you performed maintenance and failed to use methods, techniques, and practices acceptable to the Administrator;

b. violated Section 43.13(b) of the Federal Aviation Regulations, in that you performed maintenance and failed to do the work in such a manner and to use materials of such a quality that the condition of the aircraft was at least equal to its original or properly-altered condition;

c. failed to exercise the degree of care, judgment and responsibility required of the holder of a mechanic certificate; and

d. have demonstrated that you presently lack the qualifications required of the holder of a mechanic certificate.

THEREFORE, please take notice that, by reason of the foregoing circumstances, and pursuant to the authority vested in the Administrator of the Federal Aviation Administration by Section 609 of the Federal Aviation Act of 1958, as amended, we propose to revoke Mechanic Certificate No. 1561742 and any other mechanic certificate held by you and to order that no application for a new mechanic certificate be accepted from you, and that no mechanic certificate be issued to you, without prior written authorization for such action being given on behalf of the Administrator.

Unless, within fifteen days of the date of service of this Notice, we receive, in writing, your choice of the alternatives provided and set forth on the enclosed form, an Order revoking your certificate as proposed above will be issued.

This Notice does NOT revoke your certificate; however, if you wish to begin the revocation immediately, you must physically surrender your certificate to this office as provided in Option 1 of the enclosed information sheet.

DeWITTE T. LAWSON, JR.
Regional Counsel

By: Matthew Z. Markotic
Matthew Z. Markotic
Attorney

Enclosure

FORM FOR USE IN RESPONDING NOTICE

DATE _____

Federal Aviation Administration
Regional Counsel, AWP-7
P. O. Box 92007, Worldway Postal Center
Los Angeles, CA 90009

CASE NO. 87WP130101 (7.3)

In reply to your Notice of Proposed Certificate Action I elect to proceed as indicated below:

1. [ ] I hereby transmit my certificate with the understanding that an Order will be

issued as proposed effective the date of mailing of this reply; or

2. [ ] I request that the Order be issued so that I may appeal directly to the National Transportation Safety Board; or

3. [ ] I hereby submit my answer to your Notice and request that my answer and any information attached thereto be considered in connection with the allegations set forth in your Notice and your disposition of the case; or

4. [ ] I hereby request the opportunity to discuss this matter informally with a Federal Aviation Administration attorney located at 15000 Aviation Boulevard, Lawndale, California 90261. (Telephone No. 213-297-1271).

Signature _____
JUSTIN TONY CULAHARA

Home Address _____

_____

Home Telephone _____

Business Address _____

_____

Business Telephone _____

WP Form 2150-2 (9-85) (Obsoletes Previous Edition)

Aviation Safety Reporting Program

(Certificate Action)

If you have filed an Aviation Safety Report with the National Aeronautics and Space Administration (NASA) concerning the incident set forth in the attached Notice of Proposed Certificate Action, you may be entitled to waiver of any penalty. If you claim entitlement to this waiver, you must present evidence with your response satisfactory to the Administrator that you filed a report with NASA within 10 days of the incident. The date stamped receipt you have received from NASA is proof of the filing of the report. You moreover will only be entitled to waiver if it is found:

A. That this alleged violation was inadvertent and not deliberate; and

B. That this violation did not involve a criminal offense, or accident, or discloses a lack of competence or qualification to be the holder of a certificate; and

C. You have not paid a civil penalty pursuant to Section 901 of the Federal Aviation Act or been found in any prior FAA enforcement action to have committed a violation of the Federal Aviation Act or any regulation of the Federal Aviation Act since April 30, 1975.

In the event that you prove your entitlement to this waiver of penalty, an Order will be issued finding you in violation but imposing no certificate suspension. Your claim of entitlement to waiver of penalty shall constitute your agreement that this Order may be issued without further notice. You will, however, have the right to appeal

the Order to the National Transportation Safety Board pursuant to Section 609 of the Federal Aviation Act.

Office of Regional Counsel, AWP-7
Federal Aviation Administration
P. O. Box 92007
Worldway Postal Center
Los Angeles, California 90009-2007

EXHIBIT F

[Taken from]

Honolulu Star-Bulletin

Thursday, May 12, 1988

Big fines levied on Hawaiian Air

FAA safety penalty of $1.169 million is being contested

By Russ Lynch
Star-Bulletin

Hawaiian Airlines has been assessed fines totalling $1,169,000 for alleged safety violations dating back to the fall of 1984, the Federal Aviation Administration said today.

Hawaiian said today it has advised the FAA that it "denies any allegations of failure to comply with the federal aviation regulations and is contesting the allegations before the FAA."

An FAA spokesman in Washington said the "vast bulk" of the amount levied against Hawaiian Airlines, $964,000, related to events last year when mechanics repeatedly reported a damaged axle sleeve on a DC 9 jet to supervisors but allegedly were ordered not to replace it.

The mechanics replaced the wheel bearing assembly but did not repair the axle sleeve, which appeared to have been hit several times by a heavy metal object, the FAA charged. A mechanic was fired for insubordination after he refused to sign off on the work, the FAA said in its letter to the airline.

FAA inspectors finally saw the trouble themselves and ruled that the damage was beyond allowed limits, said FAA public affairs officer Fred Farrar.

The airline was fined $1,000 for each of 958 times it flew the DC 9 in the allegedly damaged condition, plus a further fine.

In a statement issued late this morning, Hawaiian said it had received a letter from the FAA "proposing to assess a civil penalty for certain alleged violations of the FAA regulations" that occurred in the first half of last year.

Hawaiian Air said that since the matter is being contested, it will not comment on the substance of the FAA claims.

Another FAA spokesman said the total fine comes from five separate civil penalty letters, starting with a small fine of $3,000 assessed on Sept. 25, 1984,and ending with a letter in March this year.

A former Hawaiian Airlines mechanic, Grant T. Norris, sued the airline in December saying he was wrongfully dismissed for refusing to sign off for the work he did on the DC-9's axle equipment.

Details of the other complaints were not immediately available.

The interisland carrier was second on a list of 15 airlines ranked according to the total amount of fines the FAA says it is owed. United Airlines was at the top of the list with $1,262,100.

Next after Hawaiian was Continental Airlines, with $962,130 owed, and the list tapered down to 15th ranked Alaska Airlines, which owes $1,000, the FAA said.

FAA spokesmen explained how the civil penalty system works. After FAA inspectors detect what they believe is a security or maintenance lapse, a letter goes to the airline detailing the charge and assessing a fine.

"They have several recourses. They can concur and pay the fine. They can request a formal meeting with the FAA to talk about the alleged violation and negotiate a fine, or they can ask a judge to rule whether it is a valid fine," Callseo said.

He said the FAA gave the Wall Street Journal and the Washington Post a list of civil penalty letters that are currently pending, in response to requests.

United said comment in inappropriate while the airline is having discussions with the FAA over the penalties.

FAA fines outstanding

The airlines with the most pending fines for allegedly violating federal air-safety and security rules:

United	$1,262,100
Hawaiian	$1,169,000
Continental	$982,130
Eastern	$893,000
Braniff	$518,000
American	$421,250
Northwest	$371,000
Pan Am	$264,500
USAir	$166,100
Delta	$147,250

EXHIBIT G

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

In the Matter of the Investigation)
of Hawaiian Airlines, Inc.)

ORDER OF INVESTIGATION

On Friday, September 18, 1987, the Federal Aviation Administration notified Hawaiian Airlines, the holder of Air Carrier Operating Certificate No. 5, that, pursuant to Section 609(a) of the Federal Aviation Act of 1958, as amended, the agency intended to conduct airworthiness inspections of the main landing gear wheel assemblies of Douglas DC-9-51 Civil Aircraft N689HA and N699HA. These inspections were to be conducted on Monday, September 21, 1987.

Between September 18 and 20, 1987, Hawaiian Airlines, Inc., performed maintenance on said Douglas DC-9-51 aircraft, by inspecting and replacing the main landing gear axle spacers (sleeves). On September 19, 1988, this agency's Inspector Thomas T. Murata visited Hawaiian Airline's maintenance base and requested Hawaiian Airlines' personnel to make the sleeves removed from the two aircraft available to him for inspection. The sleeves, however, were not made available to him. Subsequently, Hawaiian Airlines informed the Federal Aviation Administration that the 6 or 8 sleeves, which had been removed from the two aircraft,

were allegedly misplaced or lost while in the custody of Hawaiian Airlines.

The Federal Aviation Administration subsequently received information that the removed sleeves, or at least some of them, had been damaged beyond the manufacturer's limits and were therefore, unairworthy.

In order to ascertain the circumstances of the maintenance performed by Hawaiian Airlines, as described above, the condition of the removed sleeves, and the circumstances of the alleged misplacement or loss of the removed sleeves, and thus to determine whether and to what extent Hawaiian Airlines and any of its employees may have violated Sections 43.13 or 121.153(a)(2) of the Federal Aviation Regulations or any other regulation or statute, the Administrator of the Federal Aviation Administration, acting by and through his Regional Counsel, Western-Pacific Region, hereby orders that:

(1) Pursuant to authority in Sections 313, 609, and 1004 of the Federal Aviation Act of 1958, as amended, (49 U.S.C. 1354, 1429 and 1484), and Part 13 of the Federal Aviation Regulations (14 C.F.R. Part 13), an investigation be conducted in order to determine the facts and circumstances as described above.

(2) Frederick C. Woodruff is hereby designated to serve as Presiding Officer and he is delegated the authority to conduct said investigation. He may be assisted by persons he designates, and he shall have the authority pursuant to Sections 313 and 1004 of the Federal Aviation Act of 1958, as amended, to take testimony, isue subpoenas, take

depositions, administer oaths, examine witnesses, and such other authority as is contained in Section 1004 of the Federal Aviation Act of 1958, as amended.

(3) The investigation shall be conducted pursuant to procedures in Subpart F of FAR Part 13. At any hearing or deposition convened by Frederick C. Woodruff pursuant to this Order, he shall have full authority as Presiding Officer and he may be assisted by such persons as he designates. A verbatim record of any hearings or depositions will be kept. Documents produced at such hearings or depositions pursuant to a subpoena issued by Frederick C. Woodruff shall be made a part of the record of such hearings or depositions when so ordered by him as Presiding Officer.

DATED: April 13, 1988

/s/ DeWitte T. Lawson, Jr.
DeWITTE T. LAWSON, JR.
Regional Counsel

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GRANT T. NORRIS, Plaintiff, vs. HAWAIIAN AIRLINES, INC., a Hawaii corporation, Defendants.	Civil No. 88-00010 HMF MEMORANDUM AND ORDER (Filed, Mar. 28, 1988)

Grant Norris (Norris), an airline mechanic formerly employed by Hawaiian Airlines, Inc. (HAL), brought an action against HAL in Hawaii state court for wrongful termination. Norris pled five counts: Count I alleged that Norris was discharged in violation of public policy as expressed in Federal Aviation Act and regulations; Count II alleged a violation of the Hawaii Whistleblowers Protection Act, a state statute that purports to protect employees against retaliatory firings; Count III alleged that Norris had suffered emotional distress as the result of HAL's actions; Count IV sought punitive damages from HAL for allegedly outrageous conduct; and Count V stated a claim for breach of the collective bargaining agreement. HAL removed Norris's action to this court asserting that Norris's state law claims were preempted by federal labor law. Norris has moved to remand, arguing that his claims are not preempted and the federal court is without jurisdiction. HAL opposes the motion and has moved for summary judgment on the grounds that Norris's claims are preempted by federal law and

must be dismissed for failure to exhaust the grievance procedures established by the collective bargaining agreement.

I. FACTUAL BACKGROUND

Norris was employed by HAL as an FAA licensed aircraft mechanic from February 2, 1987 to August 3, 1987. *See* Norris Affidavit, attached to Motion to Remand [hereinafter Norris Aff.] Norris's FAA license carried an Airframe and Powerplant rating which gives the mechanic so rated the authority to approve and return to service an aircraft after the mechanic has made, supervised, or inspected certain repairs performed on the aircraft. *See* 14 C.F.R. §§ 65.85, 65.87 (1987). However, the mechanic may not approve for service any aircraft or part to which repairs have been made that do not conform to the applicable FAA regulations, and any fraudulent entry in any record or report required by the FAA regulations is cause for suspending or revoking the mechanic's FAA license. 14 C.F.R. § 43.12 (1987).

On July 14, 1987, Norris was servicing one of HAL's aircraft and noticed that one of the tires was worn. When the tire was removed Norris discovered that the axle sleeve, which normally has a mirror smooth surface, was scarred and pitted. Such damage to the surface of an axle sleeve can cause the sleeve to rub against the wheel bearing. The heat generated by this friction, combined with the high speed at which the wheel bearing spins on landing, can result in the bearing fusing to the sleeve and the ultimate failure of the landing gear. Norris Aff. at paragraphs 5-10. Norris believed the part was unsafe and

should be replaced, but his supervisor instead ordered the mechanics to hand sand the axle sleeve and put over it a new bearing and tire. *Id.* at paragraphs 11-13. Later the supervisor asked Norris to sign the maintenance record for installation of the tire, but Norris refused to sign unless the supervisor "could show me in the maintenance manual where it said that the axle [sleeve] was in a satisfactory condition." The supervisor did not consult the manual and told Norris that if he did not sign he would be suspended. Norris did not sign and was suspended. The next day he called the FAA and told them that there was a problem with the HAL aircraft he had serviced. *Id.* at paragraphs 15-21.

A termination hearing was held pursuant to Article XV of the collective bargaining agreement and Norris was discharged for insubordination. *See generally* Agreement Between Hawaiian Airlines, Inc. and the International Association of Machinists and Aerospace Workers (AFL-CIO), attached as Exhibit 1 to Motion for Summary Judgment [hereinafter Agreement or collective bargaining agreement]. Norris then filed a grievance regarding his termination and Norris's union representative referred the grievance for a Step 3 hearing pursuant to the Agreement. However, before the Step 3 hearing commenced, HAL issued a letter dated September 10, 1987, mitigating Norris's punishment from termination to a suspension without pay. Exhibit 3 to Motion to Remand. HAL then wrote to the union representative stating HAL's position that since Norris's punishment had been mitigated there was no need for the Step 3 hearing. *Id.*, Exhibit 4. Norris did not respond to HAL's September 10 letter and instead

filed this action in state court. The Step 3 grievance hearing was not held.

II. JURISDICTION

A. Removal Jurisdiction

I conclude at the outset that even if Counts I through IV of Norris's complaint are not preempted by federal labor law, Count V, which states a claim for breach of the collective bargaining agreement, clearly is a claim arising under federal law over which this court have removal jurisdiction. The terms and conditions of Norris's employment with HAL are governed by the collective bargaining agreement, as Norris concedes in Count V of his complaint. The Railway Labor Act (RLA), 45 U.S.C. §§ 151-185 governs labor relationships in the airline industry. *International Ass'n of Machinists v. Central Airlines*, 372 U.S. 682, 685 (1963); *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 191 (9th Cir. 1983); *Fechtelkotter v. Air Line Pilots Ass'n*, 693 F.2d 899, 902-03 (9th Cir. 1982). A claim for breach of an agreement governed by the RLA arises under federal law. *See, Scott v. Machinists Automotive Trades, District Lodge No. 190*, 827 F.2d 589, 591 (9th Cir. 1987) (claim under § 301 of the LMRA for breach of the collective bargaining agreement removable as a federal question): *Schroeder, supra*, at 191 (claims based on conduct not authorized by a collective bargaining agreement governed by the RLA arose under federal law and removable). Finally, this federal question "is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams*, 107 S.Ct. 2425, 2429 (1987).

Since federal jurisdiction at least over Count V exists, HAL could properly remove the entire action. *Lepucki v. Van Wormer*, 765 F.2d 86 (7th Cir. 1985), *cert. denied*, 474 U.S. 827 (1985); *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1430 (9th Cir. 1984). Once an action has been properly removed on the basis of a federal claim, the district court may exercise jurisdiction over pendant state claims even if the federal claim has been dismissed,[1] or it may, in its discretion, remand the state claims to state court. *Carnegie-Mellon University v. Cohill*, 108 S.Ct. 614, 622 (1988); *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-27 (1966); *Salveson, id.* In this case, however, HAL urges that Counts I through IV are completely preempted by federal labor law and thus are not pendant state claims subject to the court's discretion to remand.[2] If Norris's claims are completely preempted there are no

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[1] In its motion for summary judgment, discussed *infra*, HAL argues that Count V, as well as Counts I through IV which it believes preempted, must be dismissed for Norris's failure to exhaust the grievance procedures of the collective bargaining agreement.

[2] HAL argues that the preemptive force of the RLA is so extraordinary that it converts ordinary state common law claims into federal claims. HAL acknowledges that if federal preemption is asserted as a defense to state law claims, those claims are not converted into federal law claims. Norris argues that HAL is simply asserting preemption as a defense. To the extent that these arguments are addressed to the question of removability, they need not be resolved since I have concluded that the complaint was properly removed on the basis of Count V even if Counts I through IV are not preempted. However, these arguments are also pertinent to the question whether any claims can be remanded to state court. *See Price v. PSA, Inc.*, 829 F.2d 871, 875 (9th Cir. 1987). They are therefore discussed *infra*.

state claims to be remanded to state court. *Price v. PSA, Inc.*, 829 F.2d 871, 875 (9th Cir. 1987) (if state law claims are completely preempted by RLA, district court has no discretion to remand claims to state court). If, on the other hand, Norris's claims are not completely preempted then this court has no jurisdiction, other than pendant, over those claims and they may be remanded to state court if appropriate. *See, Carnegie-Mellon, supra*, 108 S.Ct. at 622 (court has discretion to remand pendent [sic] state law claims). The question is thus whether Counts I through IV are preempted.

B. Preemption

In some instances the preemptive force of a federal statute will be "so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim.' " *Caterpillar*, 107 S.Ct. at 2430. If an area of state law has been completely preempted, "any claim purportedly based on that preempted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Id.* Federal labor law, especially as developed under § 301 of the Labor Management Relations Act (LMRA), is an area in which the complete preemption doctrine is often applied. *Id.*

At the outset HAL urges that the preemption analysis developed under § 301 of the LMRA is equally applicable to a case involving the RLA, citing *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031, 1045 (7th Cir.), *cert. granted*, 108 S.Ct. 226 (1987). I have some doubt that this is so in view of the recent decision of the Ninth Circuit in *Price v. PSA, Inc.*, 829 F.2d 871 (9th Cir. 1987).

In *Price* the Ninth Circuit declined to extend the broad rule of preemption developed under § 301 of the LMRA to claims involving a collective bargaining agreement governed by the RLA. 829 F.2d at 875-76. Instead, the Court held that a state law claim is completely preempted by federal law only if Congress has " 'clearly manifested an intent' to convert a state law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Id.* at 876. Because the RLA does not contain a civil enforcement provision, as does § 301, the Court found that "Congress has not indicated, as it did with LMRA § 301 . . . , that the RLA is 'so powerful as to displace entirely any state cause of action.' " *Id.* (quoting *Metropolitan Life Ins. Co. v. Taylor,* 107 S.Ct. 1542, 1546 (1987)). The Court held:

> Absent a direct expression of congressional intent to create federal jurisdiction for all causes of action within the scope of Section 2, Fourth of the RLA, we believe we must abide by the well-pleaded complaint rule. Congress or the Supreme Court can steady us if either finds our step faulty. We hold that plaintiffs' state law causes of action are not completely preempted by the RLA.

Id. at 876. The Court in *Price* conceded, however, that PSA might still argue federal preemption as a defense to the plaintiff's state law claims. *Id.* at 876.

Price involved two general claims under state law: 1) claims predicated on the violation of public policy expressed in California Labor Code §§ 922 and 923, which prohibit retaliation for union organizing activities, and 2) claims based on violation of the public policy

inherent in California Code of Civil Procedure § 1209(a)(5), which prohibits disobedience of lawful court orders. *Id.* at 872. The RLA, in § 2, Fourth, 45 U.S.C. § 152, Fourth, prohibits carriers from denying or in any way questioning the right of employees to unionize. None of the provisions of § 2 of the RLA contain a civil enforcement provision.

Price relied on two recent Supreme Court cases which considered federal preemption of state law claims. First, in *Caterpillar v. Williams,* 107 S.Ct. 2430 (1987), the Supreme Court held that state law claims for breach of individual employment contracts were not completely preempted by § 301 of the LMRA. In *Caterpillar* the Court emphasized that an employee "covered by a collective bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied on is *not* a collective bargaining agreement." *Id.* at 2431-32 (emphasis in original). The *Caterpillar* Court noted that even though the state law claims were not completely preempted so as to permit removal jurisdiction, the employer could nevertheless argue as a defense in state court that the state law claims were preempted by federal law. *Id.* at 2432. The Court stated that a claim would be preempted when "the plaintiff invokes a right created by a collective bargaining agreement," but not when the defendant merely injects the federal question as a defense to a state law claim. *Id.* at 2433.

In the second case, *Metropolitan Life Ins. Co. v. Taylor,* 107 S.Ct. 1542 (1987), the Supreme Court held that an employee's state law claims for breach of contract and wrongful termination were completely preempted by

ERISA. 107 S.Ct. at 1548. The Court stated that it was deciding the question expressly left open in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), to wit: whether state law claims within the scope of ERISA's civil enforcement provision, § 502(a), 29 U.S.C. § 1132(a), were completely preempted. *Id.* at 1547. The *Metropolitan* Court found complete preemption, however, only because "the language of the jurisdictional subsection of ERISA's civil enforcement provisions closely parallels that of § 301 of the LMRA." *Id.*

The Court noted that "[f]ederal pre-emption is ordinarily a defense to plaintiff's suit" and as such "does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to a federal court." *Id.* at 1546. In a companion case, *Pilot Life Ins. Co. v. Dedeaux*, 107 S.Ct. 1549 (1987), the Court analyzed the preemptive effect of ERISA as a defense and held that state common law tort and contract claims for improper processing of a claim for benefits were preempted by ERISA. *Id.* at 1556. The *Metropolitan* court went further and found that Congress had so completely preempted the area that any civil complaint within the scope of ERISA's civil enforcement provision was necessarily federal in character and subject to removal to federal court. The Court stated:

> Even with a provision such as [ERISA's civil enforcement provision] that lies at the heart of a statute with the unique pre-emptive force of ERISA . . . , however, we would be reluctant to find that extraordinary pre-emptive power, such as has been found with respect to § 301 of the LMRA, that converts an ordinary state common law complaint into one stating a federal claim

> for purposes of the well-pleaded complaint rule. But the language of the jurisdictional subsection of ERISA's civil enforcement provision closely parallels that of § 301 of the LMRA. . . . [The legislative history of the provision also] sets out this clear intention to make [ERISA] suits brought by participants or beneficiaries federal questions for the purposes of federal court jurisdiction in a like manner as § 301 of the LMRA.

107 S.Ct. at 1547 (citations omitted).

The Ninth Circuit in *Price* found that the RLA did not have the preemptive force of ERISA or § 301 of the LMRA because it contained no similar civil enforcement provision and revealed no clear congressional intent to "create federal jurisdiction for all causes of action within the scope of Section 2, Fourth of the RLA." 829 F.2d at 876. Although *Price* was concerned only with Section 2, Fourth of the RLA, a section not applicable to Norris's claims, I believe the rationale of *Price* applies equally to this case. Although HAL argues that the RLA preempts Norris's claims, it does not identify any particular provision of the RLA that it believes preemptive. Section 2, First and Second of the RLA arguably cover Norris's claims, but neither of these provisions has a civil enforcement provision. In sum, I conclude that under *Price* Norris's state law claims set forth in Counts I through IV of his complaint are not completely preempted by the RLA and this court therefore does not have subject matter jurisdiction

over those claims except to the extent that they are pendant to a federal claim.[3]

I emphasize that HAL may still have a good federal defense to Norris's state law claims. The RLA does exhibit a congressional intent that certain disputes between an employee and employer covered by the RLA be resolved only by the grievance procedures specified and not by the courts. *Atchison T & S.F. Ry. Co. v. Buell*, 107 S.Ct. 1410, 1414 (1987); *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1978); *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972); *Lewy v. Southern Pacific Transp. Co.*, 799 F.2d 1281, 1289-92 (9th Cir. 1986). It may be that the state courts do not have jurisdiction over Norris's claims because of the preemptive effect of the RLA's administrative grievance procedures. But such preemption is a defense which can be addressed by the state courts; it does not convert Norris's claims into federal claims for jurisdictional purposes.

I am also aware of the cases from this Circuit which have held, contrary to *Price*, that state law claims implicating a collective bargaining agreement covered by the RLA present a federal question and are removable to federal court. *See, e.g. Schroeder v. Trans World Airlines,*

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[3] Even though Count I alleges a discharge in violation of public policy, as expressed in FAA regulations, it does not state on its face a federal claim. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986) (incorporation of a federal standard in a state law cause of action does not create a federal question when Congress has not provided a private action for violations of that standard).

Inc., 702 F.2d 189, 191 (9th Cir. 1983); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978). I am bound, however, to follow the most recent decisions of the Ninth Circuit. If I have not read *Price* correctly, the Ninth Circuit can "steady" me if it finds my "step faulty." *Price*, 829 F.2d at 876.

III. DISPOSITION OF CLAIMS

I have concluded that this court has federal question jurisdiction only over Count V. The remaining four state law claims are subject only to this court's pendant jurisdiction. HAL has moved for summary judgment on all of Norris's claims on the grounds that Norris has failed to exhaust the RLA's administrative grievance procedures. I conclude that summary judgment is inappropriate since it is a ruling on the merits, and the basis for the motion is lack of jurisdiction which is more properly treated as a motion to dismiss under Fed. R. Civ. P. Rule 12(h)(3). *See Miller v. Norfolk & W.R. Co.*, 834 F.2d 556, 562 (6th Cir. 1987) (where defense is that claim was really a minor dispute subject to RLA grievance procedures, claims may be dismissed on jurisdictional grounds but cannot be decided on the merits).

I conclude, however, that the claim Norris has stated in Count V of his complaint must be dismissed for lack of jurisdiction because it is subject to the exclusive administrative grievance procedures of the collective bargaining agreement and the RLA. A collective bargaining agreement between an air carrier and its employees is subject to the provisions of the RLA, 45 U.S.C. § 181. A claim for violation of a right secured by the collective bargaining

agreement is subject to RLA Section 2, First and Second, 45 U.S.C. § 152, and the grievance procedures specified in Article XV of the collective bargaining agreement and Section 204 of the RLA, 45 U.S.C. § 184. If the parties are unable to resolve their dispute through the grievance procedures of the collective bargaining agreement, they must submit their dispute to binding arbitration. *See* Article XVI of the Agreement; *I.A.M.A. v. Republic Airlines*, 761 F.2d 1386, 1389 (9th Cir. 1985) (if dispute arising out of the interpretation of a collective bargaining agreement is not resolved through internal grievance procedures, it may be referred to adjustment board, which has exclusive jurisdiction of dispute). Courts do not have jurisdiction over employment disputes within the exclusive jurisdiction of the arbitration boards established by the RLA. *See Andrews, supra*, 406 U.S. 320 (employee claiming breach of employment agreement must avail himself of grievance procedures established by RLA); *I.A.M.A. v. Alaska Airlines, Inc.*, 813 F.2d 1038, 1039-40 (9th Cir. 1987) (federal courts have no jurisdiction to resolve disputes concerning the application or interpretation of collective bargaining agreements); *I.A.M.A. v. Aloha Airlines*, 776 F.2d 812, 813 (9th Cir. 1985) (same).

In Count V Norris claims that certain acts of HAL, in particular those reflected in HAL's September 10, 1987 and September 14, 1987 letters, constitute a breach of the collective bargaining agreement. It is not disputed that Norris did not file a grievance with respect to the HAL conduct complained of in Count V or that the grievance process initiated with respect to HAL's conduct complained of in other paragraphs of the complaint was not

completed. Since Norris's claim for breach of the collective bargaining agreement involves an interpretation of the terms of that agreement and is subject to the grievance and arbitration provisions of the Agreement and the RLA, this court is without jurisdiction to entertain that claim.

Finally, I conclude that the state law claims in Counts I through IV should be remanded to state court. This court has pendant jurisdiction over these claims because they arise out of the same nucleus of operative facts. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). However, pendant jurisdiction is a doctrine of discretion, not of right, *id.* at 726, and I conclude that the state law claims should be remanded to state court rather than disposed of by this court. *Carnegie-Mellon University v. Cohill*, 108 S.Ct. 614, 622 (1987). I recognize that relevant to the exercise of discretion is whether "the allowable scope of the state claim implicates the federal doctrine of preemption," *Gibbs* at 727, and that preemption is an issue here. However, this is just one factor a court can consider when exercising its discretion. A remand, rather than dismissal, of state law claims is appropriate when it will avoid additional costs to the parties, *Carnegie-Mellon* at 9-10, and when principles of federal-state comity are involved, *id.* Moreover, "[w]hen the single federal-law claim in the action [has been] eliminated at an early stage of the litigation, [there is] a powerful reason to choose not to continue to exercise jurisdiction." *Carnegie-Mellon, id.* at 619. I conclude that these concerns dictate that the Hawaii courts decide whether Norris's state law claims may proceed despite the RLA. Those courts are perfectly capable of deciding the issue, and, indeed, have resolved

a similar issue before. *See Puchert v. Agsalud*, 677 P.2d 449 (Haw. 1984) (claim of discharge in retaliation for filing workers compensation claim held not preempted by RLA).

I thus grant the motion to remand in part. I construe the motion for summary judgment as a motion to dismiss under Fed. R. Civ. P. Rule 12(h)(3) and grant the motion in part.

It is therefore ORDERED;

1) that Count V of the complaint be dismissed for lack of jurisdiction;

2) that Counts I through IV of the complaint be remanded to state court.

DATED this 24 day of March, 1988 at Anchorage, Alaska.

/s/ James M. Fitzgerald
JAMES M. FITZGERALD
United States District Judge

EXHIBIT I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GRANT T. NORRIS, Plaintiff, vs. HAWAIIAN AIRLINES, INC., a Hawaii Corporation, Defendants.	Civil No. 88-00010 HMF *MEMORANDUM AND ORDER* (Filed Nov. 21, 1988)

Grant Norris filed a complaint in state court stating five claims against Hawaiian Airlines ("HAL"): wrongful discharge in violation of public policy (Count I), a claim that HAL violated the Hawaii Whistleblowers' Protection Act (Count II), intentional infliction of emotional distress (Count III), a claim for punitive damages for outrageous conduct (Count IV), and a claim for breach of the collective bargaining agreement (Count V). HAL removed the case to federal court asserting federal question jurisdiction. Norris filed a motion to remand and HAL filed a combined opposition and a motion for summary judgment, arguing that the federal court had removal jurisdiction over Norris's claims because those claims were completely preempted by the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq*. HAL urged that removal preemption under the RLA was analogous to removal preemption under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and, relying on Section 301

cases, argued that this court had federal question jurisdiction. HAL then argued that the federal court lacked jurisdiction over the claims because they were subject to the exclusive arbitral remedies of the RLA.

I held that the case was initially removable because the claim for breach of the collective bargaining agreement was a federal claim arising under federal law. I dismissed that claim for lack of jurisdiction because such a claim is subject to the exclusive jurisdiction of the RLA grievance processes which had not been exhausted. As to the remaining claims, I held that "complete" or removal preemption analysis developed under Section 301 was inapplicable to claims arguably within the scope of the RLA because the RLA did not contain a civil enforcement provision such as that found in ERISA and Section 301. I relied on *Price v. PSA, Inc.*, 829 F.2d 871 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1732 (1988) which held that state law claims arguably within the scope of section 2, Fourth of the RLA were not completely preempted for purposes of removal jurisdiction because the RLA contained no civil enforcement provision. Although Norris's claims were not within section 2, Fourth of the RLA, but rather section 2, First or Second, I found *Price* applicable since section 2, First and Second also contain no civil enforcement provision. Although I recognized that HAL might have a valid federal defense to Norris's state claims (i.e. that those claims were "minor disputes" subject to the exclusive jurisdiction of the RLA grievance procedures), I held that those claims could not be recharacterized as federal claims by analogy to Section 301 and hence did not create

federal jurisdiction. Although I could have exercised pendant jurisdiction over the state claims, I exercised my discretion to remand the claims to state court.[1]

HAL moved for reconsideration arguing that I had misread *Price* since *Price* did not directly involve a collective bargaining agreement and earlier Ninth Circuit cases suggested that "complete preemption" applicable under Section 301 also applied to the RLA. HAL supplemented its motion for reconsideration after the Supreme Court decided *Lingle v Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877 (1988), which elucidated the proper Section 301 analysis. I scheduled oral argument on the motion and instructed the parties to assume that I agreed that I had misread *Price* and to focus their argument on *Lingle*. At oral argument, therefore, the parties assumed that a Section 301 analysis such as that in *Lingle* applies to claims governed by the RLA.

This area of the law is rather complicated because there are various concepts which are all called "preemption". In this case two preemption doctrines converge. The first is what may be called "claim preemption" or removal preemption and it governs the removability of claims from state to federal court. Under this doctrine a federal court has jurisdiction only over "state court

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[1] If the four remaining claims are state claims then this court has pendant jurisdiction over those claims. *See United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). I have discretion to remand pendant state law claims. *Carnegie-Mellon University v. Cohill*, 108 S.Ct. 614 (1988). If, however, the four remaining claims can be "recharacterized" as federal claims, then federal question jurisdiction exists over those claims and I have no discretion to remand those claims. *See Price*, 829 F.2d at 875.

actions that originally could have been filed in federal court." *Caterpillar Inc. v. Williams*, 107 S.Ct. 2425, 2429 (1987). Ordinarily a federal defense to a well-pleaded state claim does not give rise to federal question jurisdiction. *Id.* at 2430. In some cases, however, a federal statute may have such an "extraordinary" preemptive force that it converts a state claim to a federal claim providing a basis for federal subject matter jurisdiction. *Id.* Section 301 of the LMRA is such a statute. The second broad preemption doctrine involves various theories of labor law preemption, one of which may be called "forum preemption" and it governs the jurisdiction of any court to hear claims subject to the grievance and arbitration provisions of federal labor statutes such as the RLA or the NLRA. *See, e.g., San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) (if activity is arguably subject to § 7 or § 8 of the NLRA, state as well as federal courts must defer to exclusive jurisdiction of NLRB). Although the law is far from clear and cases can be found which do not seem to distinguish the jurisdictional implications of the two doctrines, I believe that "claim preemption" as developed under Section 301 does not apply in this case.[2]

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[2] Norris could not state a claim under Section 301 of the LMRA because employers who are covered by the RLA are specifically excluded from the definition of employer contained in the LMRA. *See* 29 U.S.C. § 152(2). An employee who claims that his employer has breached the collective bargaining agreement must pursue the grievance procedures created by the RLA. Neither a federal court nor a state court has jurisdiction over claims subject to the RLA grievance procedures until those procedures have been exhausted. Since Norris has no federal claim similar to a Section 301 claim I believe that preemption under the RLA is merely a federal defense which does not give rise to removal jurisdiction. *See, e.g., Caterpillar Inc, v. Williams*, 107 S.Ct. 2425, 2430 (1987) (ordinarily federal pre-emption is a defense that does not give rise to removal jurisdiction).

Thus, I do not believe that Norris's state claims can be "recharacterized" as federal claims for removal purposes pursuant to the analysis developed under Section 301. *See generally Miller v. Norfolk & Western Railway Co.*, 834 F.2d 556 (6th Cir. 1987) (discussing the various preemption doctrines applicable in RLA case and the "difficult and subtle issues" that arise and expressing doubt that Section 301 preemption doctrine applies to RLA cases); *see also Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877, 1883 n. 8 (1988) (distinguishing Section 301 preemption from other labor law preemption doctrines).

It is true that whatever state law claims Norris has may be subject to the defense that the claims are within the exclusive jurisdiction of the RLA grievance procedures. *See, e.g., Lewy v. Southern Pacific Transp. Co.*, 799 F.2d 1281, 1290 (9th Cir. 1986) (any claim that can be characterized as a "minor dispute" under the RLA is within the exclusive jurisdiction of the arbitral authority created by the RLA). However, the issue presently before this court is one of federal subject matter jurisdiction and a federal defense does not provide federal question jurisdiction. *See, e.g., Caterpillar*, 107 S.Ct. at 2432 (fact that defendant may ultimately provide that state claims are preempted by NLRB's exclusive jurisdiction does not establish that they are removable to federal court) (citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)); *see generally Franchise Tax Board v. Construction Laborers Trust*, 463 U.S. 1 (1983). Thus I concluded that

this court has no federal question jurisdiction over Norris's claims even though those claims might be subject to the federal defense of forum preemption.

HAL urges, however, that this court has federal question jurisdiction because Norris's state law claims are completely preempted by the RLA in the same manner that such claims would be completely preempted under Section 301. HAL relies on several cases which have seemingly applied "claim preemption" to RLA cases. *Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir. 1983); *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189 (9th Cir. 1983); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978); *see also Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972).[3] None of these cases, however, fully discussed or analyzed the question of removal jurisdiction in light of the recent Supreme Court cases which have elucidated the doctrine. *See, e.g. Caterpillar, Inc. v. Williams*, 107 S.Ct. 2425 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 107 S.Ct. 1542 (1987); *Franchise Tax Board v. Construction Laborers Vacation Trust* 463 U.S. 1 (1983). The Ninth Circuit in *Price* adopted a removal analysis which incorporates these decisions and I followed *Price*. However, *Price* did not deal precisely with claims arguably

[3] In *Andrews* an employee subject to the RLA filed a claim in state court for breach of contract based on a wrongful discharge. The Supreme Court held that the claim was subject to the grievance and arbitration procedures of the RLA since the source of the employee's right was the collective bargaining agreement. The basis for federal jurisdiction in *Andrews* was unclear. Nevertheless, the Supreme Court in *Andrews* relied in part on cases considering preemption under Section 301.

within the scope of a collective bargaining agreement under the RLA and may not apply in this case. Furthermore, even if *Price* could be construed to apply in cases such as this, it may be inconsistent with the earlier Ninth Circuit decisions in *Beers, Schroeder* and *Magnuson* which found that removal of state law claims that were subject to RLA preemption was proper. Since *Price* was a panel decision and not *en banc* I must follow *Beers, Schroeder* and *Magnuson* and determine whether Norris's claims are completely preempted for removal purpose by the RLA. *See, e.g., Antonio v. Wards Cove Packing Co., Inc.*, 768 F.2d 1120, 1132 n. 6 (9th Cir.), *withdrawn*, 787 F.2d 462 (9th Cir. 1985), *reversed*, 810 F.2d 1477 (9th Cir. 1987) (*en banc*) (panel decision is the law of the circuit until overruled by *en banc* court); *LeVick v. Skaggs Co., Inc.*, 701 F.2d 777, 778 (9th Cir. 1983) (absent *en banc* decision, prior panel decision is controlling authority for subsequent panel).

I. Claim Preemption

The parties rely on the recent Supreme Court case *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877 (1988), and several recent Ninth Circuit cases construing *Lingle*. Newberry v. Pacific Racing Association, 854 F.2d 1142 (9th Cir. 1988); *Miller v. AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988); *Hyles v. Mensing*, 849 F.2d 1213 (9th Cir. 1988). In *Lingle* the Supreme Court held that a worker's claim that she had been discharged in violation of the Illinois Workers' Compensation Act was not preempted under Section 301. The Court held that a state law claim is preempted by Section 301 only if application of state law "requires" the interpretation of a collective bargaining agreement. 108 S.Ct. at 1885. To determine

whether the state law claim was preempted, the Supreme Court first looked to the elements of the state law claim. *Id.* at 1881-82. In *Lingle* the state law tort required a showing that (1) the employee was discharged or threatened with discharge, and (2) the employer's motive in discharging or threatening to discharge was to deter the employee from exercising her rights under the Illinois Workers' Compensation Act. *Id.* at 1882. The Court concluded that the state tort claim did not require an interpretation of the collective bargaining agreement:

> Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of the collective bargaining agreement. To defend against a retaliatory discharge claim, an employer must show that it had a nonretaliatory reason for the discharge; this purely factual inquiry likewise does not turn on the meaning of any provision of a collective bargaining agreement. Thus the state law remedy in this case is 'independent' of the collective bargaining in the sense of 'independent' that matters for § 301 pre-emption purposes: resolution of the state law claim does not require construing the collective bargaining agreement.

Id. (citations omitted).

The Court rejected the analysis relied on by the court of appeals and concluded that even though a state law analysis "might well involve attention to the same factual considerations as the contractual determination of whether Lingle was fired for just cause" under the terms

of the collective bargaining agreement, such "parallelism" does not render the state law claim preempted by Section 301. *Id.* at 1883. The Court reemphasized that Section 301 preemption:

> merely ensures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a state may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements. In other words, even if dispute resolution pursuant to a collective bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes.

Id. (footnotes omitted). The Court also rejected any analysis that would turn on whether the state law rights were "negotiable" or "nonnegotiable" since certain "nonnegotiable" state law rights may still require interpretation of a collective bargaining agreement. *Id.* at 1882 n. 7.

The *Lingle* Court reaffirmed the approach adopted in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). In *Lueck* the Supreme Court held that a state law claim for bad-faith handling of an insurance claim was preempted by Section 301 when applied to the handling of a claim under a disability plan included in a collective bargaining agreement. In *Lueck* the court held that a state tort law is preempted if it:

> confers nonnegotiable state-law rights on employers or employees independent of any

> right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract. If the state law purports to define the meaning of the contract relationship, that law is pre-empted.

Id. at 213. The tort in *Lueck* was preempted because "the tort exists for breach of a 'duty devolv[ed] upon the insurer by reasonable implication from the express terms of the contract,' the scope of which, crucially, is 'ascertained from a consideration of the contract itself.'" *Id.* at 216 (quoting *Hilker v. Western Automobile Ins. Co.*, 204 Wis. 1, 13-16, 235 N.W. 413, 414-15 (1931)). Since the "duties imposed and rights established through the state tort . . . derive from the rights and obligations established by the contract," *id*, at 217, the state tort was preempted by Section 301.

In *Miller v. AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988) the Ninth Circuit held that an employee's state law claim alleging discrimination based on handicap, in violation of an Oregon statute protecting the physically handicapped, was not preempted by Section 301. Miller claimed that he was discharged in violation of the Oregon statute and sued his employer in state court. His employer then removed the action to federal court, asserting that Miller's claims were inextricably intertwined with the terms of the pertinent collective bargaining agreement. The court reasoned:

> If a court can uphold state rights without interpreting the terms of a [collective bargaining agreement], allowing suit based on the state rights does not undermine the purpose of section 301 preemption: guaranteeing uniform

> interpretation of terms in collective bargaining agreements. . . . [W]e cannot accept defendants' claim that parallel protection in collective bargaining agreements mandates preemption. . . . Finding preemption whenever [collective bargaining agreements] offer protections similar to those provided by state law is inappropriate because it fails to distinguish between state laws that require interpretation of the terms in a [collective bargaining agreement] and state laws that disallow all agreements to particular terms.

Id. at 545-47 (citations omitted). The Ninth Circuit found that the Oregon handicap statute as construed by the Oregon Supreme Court did not require interpretation of any terms of the collective bargaining agreement because the employee's rights under the statute were not controlled by the question of whether or not the employer acted in good faith or no reasonable grounds. *Id.* at 549. Instead, an employee's rights under the statute depended only upon a factual inquiry as to whether the employee can or cannot do the job in a satisfactory manner. *Id.*;[4] *see*

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[4] Although *Miller* was originally decided without reference to *Lingle*, in an amended opinion the Ninth Circuit stated that *Lingle* "confirms the approach we have taken in this opinion." *Miller*, slip op. at 10188 (9th Circuit, August 24, 1988).

In *Newberry v. Pacific Racing Ass'n*, 854 F.2d 1142 (9th Cir. 1988) the Ninth Circuit considered whether an employee's claims for breach of an implied covenant of good faith and fair dealing and intentional infliction of emotional distress were preempted under Section 301. Newberry had initially filed her claims in state court and the defendant had removed the action to federal court. The Ninth circuit found that Newberry's claims were preempted because her claims "require[d] [the court] to interpret the specific language of the [collective bargaining] agreement's terms. *Id.* at 1147-48.

also Ackerman v. Western Electric Co., slip op. (9th Cir., November 8, 1988).

Thus the question whether a state law claim is preempted by Section 301 depends first upon an analysis of the state law claim asserted. If an element of the state law claim is derived from or dependent upon a right or duty established by contract and the contract at issue is a collective bargaining agreement, then the state law claim will be preempted. On the other hand, if the elements of the state law claim exist independently of any contract then the state law claim will not be preempted. The fact that the collective bargaining agreement may establish similar or parallel rights does not establish preemption, nor does the fact that certain facts may be common to both an inquiry conducted pursuant to the agreement and an inquiry required by a state law analysis.

II. State Law

A. Hawaii Whistleblowers' Protection Act

Norris has claimed that HAL discharged him in violation of the Hawaii Whistleblowers' Protection Act, Haw. Rev. Stat. § 378-61 *et seq*. The Act provides:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:
>
> (1) The employee . . . reports or is about to report to a public body, verbally or in writing, a violation or suspected violation of a law or rule adopted pursuant to the law of this State, a political subdivision of this State, or the United States, unless the employee knows that the report is false;. . . .

Haw. Rev. Stat. § 378-62. The Act confers a civil cause of action for violations of the Act. Haw. Rev. Stat. § 378-63. The Act also provides that it "shall not be construed to diminish or impair the rights of a person under any collective bargaining agreement." Haw. Rev. Stat. § 378-66(a). Finally, the Act states:

> Where a collective bargaining agreement provides an employee rights and remedies superior to the rights and remedies provided herein, contractual rights shall supercede [sic] and take precedence over the rights, remedies, and procedures provided in this part. Where a collective bargaining agreement provides inferior rights and remedies to those provided in this part, the provisions of this part shall supercede [sic] and take precedence over the rights, remedies, and procedures provided in the collective bargaining agreement.

Haw. Rev. Stat. § 378-66(b).

The Hawaii courts have yet to construe the scope of this Act or the nature of the cause of action conferred by the Act. However, several other states have similar acts which have been considered by the courts. Michigan, in particular, has a whistleblowers' act that is virtually identical to Hawaii's act and has been construed by the courts of that state. *See Hopkins v. City of Midland*, 404 N.W.2d 744 (Mich. App. 1987); *Tuttle v. Bloomfield Hills School Dist.*, 402 N.W.2d 54 (Mich. App. 1986). In *Hopkins* the court set forth the prima facie elements of a claim under the whistleblowers' act:

> [P]laintiff must prove: (1) that plaintiff was engaged in protected activity as defined by the act; (2) that plaintiff was subsequently not promoted [or discharged]; and (3) that a causal connection exists between the protected activity and the failure to promote [or discharge].

404 N.W.2d at 751. If the plaintiff makes out a prima facie case, the burden shifts to the defendant to show some nonretalitory reason for the discharge. *Id.* If the defendant shows a nonretalitory reason for the discharge, the plaintiff may show that the reason proferred [sic] by the defendant was only a pretext. *Id.*

None of the elements of a claim under the Whistleblowers' Act is derived from or depends upon a right conferred by a collective bargaining agreement or any other contract. The elements of a claim under the Act are, in fact, similar to the elements of the claim which the *Lingle* court found not preempted. 108 S.Ct. at 1882 (employee must show discharge and that employer's motive in discharge was to deter employee from exercising rights under Act). In this case, as in *Lingle*, the existence of a cause of action turns on the "purely factual questions pertain[ing] to the conduct of the employee and the conduct and motivation of the employer." *Id.* Moreover, to defend against a claim under the Act in this case, as in *Lingle*, the employer must show that it had a nonretalitory reason for the discharge, a "purely factual inquiry [which] likewise does not turn on the meaning of any provision of a collective bargaining agreement. *Id.*

HAL argues that a claim under the Whistleblowers' Act is preempted because that Act "explicitly *requires* the

court to interpret the rights and remedies of any applicable collective bargaining agreement" in Section 378-66(b). Third supplemental Memorandum in Support of Motion for Reconsideration at 11. While I agree that the Act may require a court to compare the rights and remedies available to an employee under the Act with any rights and remedies available to an employee under an applicable collective bargaining agreement, I do not agree that this compels the conclusion that any claims under the Act are preempted. First, the Act makes clear that the rights and remedies it confers are independent of any similar or contrary provisions of a collective bargaining agreement.[5] An employee who states a claim under the Act may recover irrespective of any provisions of his collective bargaining agreement. Second, although an employee may be entitled to *additional relief* under a collective bargaining agreement, a collective bargaining agreement cannot *diminish* his statutory rights. Thus an employee's substantive rights *under the Act* are independent of the terms of any collective bargaining agreement. Finally, the Supreme Court in *Lingle* explicitly rejected the argument HAL advances here:

> A collective bargaining agreement may, of course, contain information such as rate of pay

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[5] *See, e.g., Hopkins*, 404 N.W.2d at 749 (construing Michigan Act):

> [T]he act creates rights belonging to individual employees, not collectively represented groups. The substantive provisions of the act do not depend on whether an employee is subject to a collective bargaining agreement.

and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state law suit is entitled. . . . although federal law would govern the interpretation of the agreement to determine the proper damages, the underlying state law claim, not otherwise pre-empted, would stand. Thus, as a general proposition, a state law claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement and a separate state law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state law analysis would not be thereby pre-empted. As we said in *Allis-Chalmers Corp. v. Lueck*, 471 U.S., at 211, 105 S.Ct., at 1911, 'not every dispute . . . tangentially involving a provision of a collective-bargaining agreement is pre-empted by § 301. . . . '

108 S.Ct. at 1885 n. 12 (citations omitted). Norris's claim under the Hawaii Whistleblowers' Protection Act exists completely independently of any provisions of his collective bargaining agreement: no element in his prima facie case or in the possible defense requires or depends on any interpretation of his collective bargaining agreement. The provision of the Act ensuring that any additional rights and remedies provided in a collective bargaining agreement are not limited by the Act has no impact on Norris's substantive rights under the Act.[6]

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[6] The Michigan courts have also concluded that claims under its whistleblowers' act are independent statutory rights. *Hopkins*, 404 N.W.2d at 750; *Tuttle*, 402 N.W.2d at 56-57.

III. Wrongful Discharge in Violation of Public Policy

Norris has also stated a claim for wrongful discharge in violation of public policy, claiming that his discharge was "in violation of the public policy expressed in the Federal Aviation Act and the Federal Aviation Regulations." Norris relies on *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625 (Hawaii 1982) in which the Hawaii Supreme Court held that "an employer may be held liable in tort where his discharge of an employee violates a clear mandate of public policy." *Id.* at 631.

HAL first argues that this claim is preempted because Norris alleges a violation of federal public policy rather than state public policy, citing *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1486 (1984). The Ninth Circuit has noted that *Olguin* was decided before *Allis-Chalmers* and is "no longer binding precedent." *Miller*, 850 F.2d at 549 (citing *Vincent v. Trend Western Technical Corp.*, 828 F.2d 563, 565-66 (9th Cir. 1987)). *Olguin* is in any event distinguishable. The court in *Olguin* concluded that the plaintiff "cannot now seek protection in state law" because Arizona "has little interest in enforcing federal law." The Supreme Court of Hawaii, however, has recognized that the state tort of wrongful discharge in violation of public policy includes allegations that the discharge violated a federal policy. *Parnar*, 652 P.2d at 631 (finding the relevant public policy in the federal antitrust laws).

HAL also argues that Norris's claim is preempted because the Hawaii Supreme Court would not extend the *Parnar* remedy to an employee covered by a collective

bargaining agreement. HAL notes that *Parnar* discussed the state tort as an exception to the "at-will" doctrine and thus concludes that the tort of wrongful discharge in violation of public policy applies only to "at-will" employees. Norris notes that the *Parnar* court did not explicitly limit its holding to "at-will" employees and that some states have extended the tort to employees covered by a collective bargaining agreement. HAL counters that other states have limited the tort to "at-will" employees. I conclude that I need not resolve this issue because it involves the merits of Norris's claim and is inapposite to the only question presently before me: whether this court has federal question jurisdiction over a claim for wrongful discharge in violation of public policy. To determine this issue I must simply look to the claim alleged in the complaint and, assuming that the claim is valid, apply *Lingle* to determine whether the claim is preempted by federal law. If the claim is not preempted this court has no jurisdiction and cannot reach the merits. If the claim is preempted this court may reach the merits and determine whether the tort would apply to an employee such as Norris.

The question under *Lingle* is whether a claim for wrongful discharge in violation of public policy is a claim derived from or dependent on the terms of a collective bargaining agreement.[7] To state a claim for wrongful

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[7] HAL's argument that the state tort does not apply to employees covered by a collective bargaining agreement seems to answer this question: if the claim exists only for "at-will" employees who do not have a collective bargaining agreement, then the claim probably does not derive from or depend on the terms of a collective bargaining agreement under *Lingle*.

discharge in violation of public policy, an employee must show (1) that there is a clear mandate of public policy; and (2) that his discharge was motivated by reasons that contravene a clear mandate of public policy. *See generally Parnar*, 652 P.2d at 631-32; *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1089 (Wash. 1984) (*en banc*). Once the employee has made this threshhold [sic] showing, the burden shifts to the employer to show that the discharge was for reasons other than those alleged by the employee. *Thompson*, 685 P.2d at 1089.

This cause of action, like the cause of action in *Lingle*, does not require an interpretation of the collective bargaining agreement. The public policy is not found in the collective bargaining agreement but in "a constitutional, statutory, or regulatory provision or scheme." *Parnar* at 631. The motivation of the employer is a "purely factual" question. *Lingle*, 108 S.Ct. at 1882. To defend against the claim an employer must show that it was not motivated by a reason that contravenes public policy: "this purely factual inquiry likewise does not turn on the meaning of any provision of a collective bargaining agreement. *Id.* I therefore conclude that Norris's claim that HAL discharged him in violation of public policy is not preempted under *Lingle*. *See also, e.g., DeSoto v. Yellow Freight Systems, Inc.*, 851 F.2d 1207 (9th Cir. 1988) (reversing decision reported at 820 F.2d 1434 and holding that employee's claim that he was discharged for refusing to violate state law was not preempted under *Lingle*); *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 863 (9th Cir. 1987), *cert.*

denied, 108 S. Ct. 2819 (1988) (claim for wrongful discharge in violation of public policy not preempted by section 301).[8]

IV. Emotional Distress

Norris asserts a claim for emotional distress, alleging that HAL's actions, "including the manner in which Norris's discharge hearing was conducted by a kangaroo court, the manner in which Norris was intimidated under pain of suspension and/or discharge to falsify aircraft maintenance records, and the manner in which Norris was threatened by the Assistant Director when the latter had been notified of Norris' report to the FAA."

In Hawaii a defendant may be liable for intentional infliction of emotional distress if his acts were "unreasonable," which is construed to mean "without just cause or excuse and beyond all bounds of decency" or "outrageous." *Chedester v. Stecker*, 643 P.2d 532, 535 (Hawaii 1982). The Ninth Circuit has noted that "[b]ecause the tort requires inquiry into the appropriateness of the defendant's behavior, the terms of the [collective bargaining agreement] can become relevant in evaluating

[8] The fact that the collective bargaining agreement also provides that "[a]n employee's refusal to perform work which is in violation of established health and safety rules, or any local, state or federal health and safety law shall not warrant disciplinary action" does not mandate a finding of preemption since *Lingle* made clear that "such parallelism" between a state cause of action and rights under the collective bargaining agreement does not require a finding of preemption. 108 S.Ct. at 1883. *See also Ackerman*, slip op. at 13902.

whether the defendant's conduct was reasonable" since actions permitted by the agreement 'might be deemed reasonable'." *Miller*, 850 F.2d at 550. The *Miller* court concluded that in emotional distress cases independence from the collective bargaining agreement will be difficult to find. The Court noted, however, that these considerations

> do not lead to preemption of all emotional distress claims. Such claims may not be preempted if the particular offending behavior has been explicitly prohibited by mandatory statute or judicial decree, and the state holds violation of that rule in all circumstances sufficiently outrageous to support an emotional distress claim.

Id. at n. 5. I conclude that Norris's emotional distress claim is not preempted to the extent that it is based upon conduct that is prohibited by the Hawaii Whistleblowers' Protection Act or the tort of wrongful discharge in violation of public policy. Since I have concluded that Norris' claims against HAL based the whistleblowers' act and the state tort are not preempted, a claim for emotional distress based on the same conduct is not preempted. The Hawaii courts may determine that conduct in violation of the Act or public policy is *per se* outrageous. The conduct which forms the basis for the emotional distress claim is not controlled by the collective bargaining agreement but by independent state laws. However, Norris's emotional distress claim is preempted to the extent that it is premised on the conduct of the employer in carrying out the procedures established by the collective bargaining agreement. *See Newberry*, 854 F.2d at 1149 (emotional distress claim preempted where it was clear that claim arose

out of discharge and defendant's conduct in investigation leading to discharge).

V. Punitive Damages

Norris has also stated a claim for punitive damages. The claim is based on all the factual allegations of the complaint *except* those alleged in conjunction with the claim that HAL breached the collective bargaining agreement. Complaint, Paragraph 32. I conclude that the claim for punitive damages is not preempted since it is not premised upon conduct governed by the collective bargaining agreement but rather upon conduct which gives rise to an independent state law claim.

VI. Conclusion

I have reconsidered my previous order and conclude that even if the doctrine of "complete" or removal preemption developed under Section 301 applies to state law claims arguably within the scope of the RLA, Norris's state law claims are not "completely" preempted and hence were not properly removed to this court. I continue to believe, however, that the removal preemption doctrine articulated by the Supreme Court with respect to Section 301 suits is inapplicable to state law claims that are arguably "minor disputes" subject to the exclusive jurisdiction of the RLA grievance procedures. Preemption under the RLA, unlike "complete" preemption under Section 301, is a federal defense which does not provide a basis for federal subject matter jurisdiction.

IT IS THEREFORE ORDERED that, having reconsidered my previous order and reaching the same result, Counts I through IV of the Complaint be remanded to state court and Count V be dismissed.

DATED this 16th day of November, 1988 at Anchorage, Alaska.

James M. Fitzgerald
JAMES M. FITZGERALD
United States District Judge

EXHIBIT J

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HAWAIIAN AIRLINES, INC., Petitioner, vs. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII, Respondent.	No. 89-700006 DC# CV-88-000100-HMF Hawaii ORDER (Filed May 18, 1989)
GRANT T. NORRIS, Real Party in Interest.	

Before: BROWNING, THOMPSON and LEAVY, Circuit Judges

The petition for writ of mandamus is denied. *See Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977).

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

GRANT T. NORRIS, Plaintiff, v. HAWAIIAN AIRLINES, INC., Defendant.	CIVIL NO. 87-3894-12 DEPOSITION UPON WRITTEN INTERROGATORIES TRIAL DATE: 3/26/90

DEPOSITION OF RICHARD S. TEIXEIRA

RECORDS OF: CUSTODIAN OF RECORDS
Federal Aviation Administration
FAA Flight Center
90 Nakolo Place
Room 215
Honolulu, Hawaii 96819

taken upon written interrogatories on behalf of the Plaintiff on December 6, 1989, commencing at 9:30 a.m., at the offices of the Federal Aviation Administration, FAA Flight Center, 90 Nakolo place, Room 215, Honolulu, Hawaii 96819, pursuant to Rule 31, *Hawaii Rules of Civil Procedure.*

BEFORE: DAVID W. REITZ III
notary Public State of Hawaii

[p. 2] ATTORNEYS OF RECORD

Attorneys for Plaintiff:
EDWARD deLAPPE BOYLE, ESQ.
THOMAS YAMACHIKA, ESQ.
Cades, Schutte, Fleming & Wright
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Honolulu, Hawaii 96813

Attorneys for Defendant:

KENNETH B. HIPP, ESQ.
MARK E. RECKTENWALD, ESQ.
Goodsill, Anderson, Quinn & Stifel
1600 Bancorp Tower
Financial Plaza of the Pacific
130 Merchant Street
Honolulu, Hawaii 96813

[p. 3] *RICHARD S. TEIXEIRA* called upon written interrogatories by and on behalf of the plaintiff, GRANT T. NORRIS, having been first sworn to tell the truth in his interrogatories propounded to him by the Notary Public, made the following:

1. Q Please state Your name and address for the record.

A Richard S. Teixeira.

2. Q By whom are you employed?

A Federal Aviation Administration.

3. Q Describe briefly your duties with your employer?

A I am the acting manager of the Honolulu Flight Standards District Office. My responsibility is for all functions of all employees in the office.

4. Q Have you been designated the Custodian of Records of the Federal Aviation Administration for the purposes of appearing and testifying at this deposition?

A Yes.

5. Q Were you served with a Subpoena Duces Tecum demanding your appearance here today and directing

You to bring with you certain documents described in [p. 4] the Subpoena Duces Tecum?

A I was not served personally. The FAA was served.

6. Q Have you brought with you any documents today in response to the Subpoena Duces Tecum?

A Yes I have.

7. Q Please describe in general terms the documents that you have brought with you today, if any.

A What I brought is the FAA's Enforcement Investigative Report No. 87 WP 130109. I have brought three (3) letters related to that Report, dated March 2, 1988 to Hawaiian Airlines from DeWitte Lawson, Jr., dated March 17, 1988 to Paul J. Finazzo of Hawaiian Airlines from H. C. McClure, and April 13, 1989 to John B. Hill from DeWitte Lawson, Jr. All three of these letters relate to Report No. 87 WP 130109. And I have brought copies of 26 depositions.

8. Q Are there any documents in the custody or possession of the Federal Aviation Administration that are responsive to the Subpoena Duces Tecum, but which you have not brought with you today?

A No.

9. Q If your answer to the preceding question is in the affirmative, please state the reasons why you have not brought such other documents with you here [p. 5] today.

A Not applicable.

10. Q Are the documents that you have brought with you here today documents maintained by the Federal

Aviation Administration in the ordinary course and scope of its business?

A Yes.

11. Q Would you please turn the documents over to the Court Reporter at this time for numbering and copying so that they may be attached as Exhibits to the transcript of this deposition?

A Yes. We are turning these over to be copied and returned to us.

12. Q Are you willing to waive the signing of this deposition?

A Yes.

(WHEREUPON THE DEPOSITION WAS CONCLUDED.)

Norris-FAA.rd

[p. 1] IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

GRANT T. NORRIS,	)	CIVIL NO.
Plaintiff,	)	87-3894-12
vs.	)	
HAWAIIAN AIRLINES, INC.,	)	
Defendant.	)	
	)	Volume 1

DEPOSITION OF THOMAS SEALY, Taken on behalf of Defendant at the offices of Goodsill Anderson Quinn & Stifel, 1600 Bancorp Tower, 130 Merchant Street, Honolulu, Hawaii, 96813, commencing at 9:12 a.m. on Tuesday, January 9, 1990.

REPORTED BY: JOAN IZUMIGAWA, CSR No. 136
Notary Public, State of Hawaii

* * *

[p. 137] A It was around 5:00 a.m.

Q We're at the stage in your testimony, I believe, where you're attempting to get off the inner bearing. Now, if you would set the scene for me again. Who was present at that time while you're using the 2 screwdrivers to try to pry off the inner bearing?

A Myself, John Daniels, Grant Norris, Hank Wong, and periodically coming and going was the lead and also Justin.

Q Now, exactly when did Justin walk up?

A I believe the first time he came up was when we were wrestling with the inner bearing.

Q Had any comments been made, other than that one comment that you alluded to earlier, regarding the condition of the sleeve by anybody at that time, at the time Justin walks up while you were wrestling with the inner bearing?

A I can't remember what was – what was being said. I – I just remember that we were having trouble with the sleeve and – and we were discussing, you know, the damage that was on the sleeve with Hank Wong.

Q So prior to – excuse me. Did you misstate? You were having trouble with the bearing, inner bearing, or with the sleeve?

A We were having trouble – we were having [p. 138] trouble getting the bearing off of the sleeve.

Q Okay. So you had discussed the damage with Hank Wong prior to Justin Culahara walking up?

A I can't remember that.

Q Do you remember anything that was said regarding the – the sleeve prior to Justin Culahara walking up?

A Yes.

Q Tell me everything that you recall that was said regarding the sleeve prior to Justin Culahara walking up.

A We just – you know, we were discussing the sleeve with Hank and – you know, and we pointed out to him, you know, "Look at this damage on here." You know, "This – this isn't supposed to be like this." And

Hank Wong, he agreed with what we were saying, and he recommended that he wanted the sleeve to be changed.

Q Okay. Do you remember who said – do you remember anything else that was said about the condition of the sleeve before Culahara walks up?

A No.

Q Do you remember who said, "Look at this damage. This isn't supposed to be like this"?

A No.

Q Do you remember precisely that Mr. Wong said [p. 139] that he agreed with that statement?

A He was just nodding to what we were saying and – you know, that, "Yeah, this sleeve is bad and it should be changed."

Q Okay. Did he nod or did he make a statement?

A I can't remember.

Q Did he make a statement that the sleeve should be changed?

A Yes.

Q Do you remember what his words were when he made that statement?

A Just that the sleeve should be changed.

Q Okay. This is at the time before the inner bearing is removed?

A Yes.

Q Do you recall anybody else saying anything about the condition of the sleeve prior to Justin Culahara arriving?

A Our lead.

Q Okay. Is that the statement you testified to earlier about, "You should see the one on Aircraft 69"?

A Yes.

Q Did Mr. Nishibun say any other statement aside from that one?

A I can't recall.

[p. 140] Q Okay. Did anybody else aside from Mr. Nishibun and what you've just testified to make any statement about the condition of the sleeve before Justin Culahara walked up?

A Just our – just our conversation between the mechanics and Hank, you know, talking about the damage. That's all that I can remember.

Q Do you remember if Mr. Norris said anything about the condition of the sleeve?

A We all talked about it.

Q Do you remember if Mr. Daniels said anything in particular about the condition of the sleeve?

A We all talked about it.

Q Okay. Now, Mr. Culahara comes walking up. What is said when he walks up?

A He said that the sleeve was fine, and then when we showed him, meaning the mechanics and Hank Wong,

when we were – when we pointed out this damage to him, he ordered me to go to supply and get some sandpaper and sand down the burr marks on the sleeve.

Q Did he say anything else?

A Not at that time.

Q Did anyone say anything in response to his statement that, "This sleeve is fine"?

A I can't remember.

[p. 141] Q Do you remember if Mr. Norris said anything in response to that statement?

A Not at that time.

Q Did Mr. Wong say anything to him, to Justin Culahara?

A He told him that – that he wanted the sleeve to be changed.

Q Did he say why?

A Because it was damaged.

Q He wanted the sleeve to be changed because it was damaged?

A I can't remember the words he used, but he had informed him that he did want the sleeve changed.

Q What did Mr. Culahara say in response to that?

A His response was – was only to get it – a new tire back on the plane and get the plane out to the terminal for a 6:00 o'clock flight.

Q So did he respond as to whether – as to the damage on the sleeve? Did he say anything about the damage on the sleeve?

A He only told me to go to supply and get sandpaper and sand down the burr marks.

Q Was anything else said – well, let me ask you this: Did you then go and get some sandpaper?

A Yes.

* * *

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

GRANT T. NORRIS, Plaintiff, vs. HAWAIIAN AIRLINES, INC., Defendant.	)	Civil No. 87-3894-12
GRANT T. NORRIS, Plaintiff, PAUL J. FINAZZO; HOWARD E. OGDEN; HATSUO HONMA; and DOES 1-50, Defendants.	)	Civil No. 89-2904-09

DEPOSITION OF SAMSON POOMAIHEALANI, Taken on behalf of Plaintiff, at the offices of Cades, Schutte, Fleming & Wright, 1000 Bishop Street, 10th Floor, Honolulu, Hawaii 96813, commencing at 8:50 a.m., on Thursday, February 15, 1990, pursuant to Notice.

BEFORE:

GRACE HOYT, RPR, CSR 272
Notary Public, State of Hawaii

* * *

[p. 4] (Pursuant to Rule of the Rules governing Court Reporting in Honolulu, the Reporter's Disclosure was made and is attached hereto.)

SAMSON POOMAIHEALANI, called as a witness on behalf of Plaintiff, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MS. MOLLWAY:

Q. Would you state your name?

A. Samson Poomaihealani.

Q. And your address?

MR. RECKTENWALD: I'm sorry. Just for the record, I am going to note our objection to the double noticing of the depositions in the Finazzo matter and the Hawaiian Airlines matter, as we stated in our correspondence.

Q. (By Ms. Mollway) Could you state your residence address?

A. My residence address is 45-825 Anoi Road, Kaneohe, 96744.

Q. Are you presently employed?

[p. 5] A. Yes, I am.

Q. Who is your present employer?

A. I'm employed by the International Association of Machinists and Aerospace Workers, District Lodge 141.

Q. OK. And how long have you been employed by the IAM?

A. I've been employed with them since May of 1985.

Q. What is your present position?

A. My present position is an assistant general chairman.

Q. Have you held the same position since May of 1985?

A. No.

Q. What position did you hold when you joined the IAM?

A. The position I held when I was in office was vice president, Hawaii.

Q. Was that in May of '85?

A. Yes.

Q. And how long did you hold that position?

A. I held that office until December 31st, 1987.

Q. When you say "in office," what do you mean?

[p. 6] A. Well, I've been a member of the IAM since 1963.

Q. OK. So 1985 was when you began to be employed on the staff of the IAM?

A. Solely employed by the union.

Q. Starting January 1, 1988, what position did you hold on the staff of the union?

A. The position I'm presently holding, which is assistant general chairman.

Q. And have your duties as assistant general chairman generally stayed the same throughout the period that you've been the assistant general chairman?

A. Yes.

Q. What were your duties as vice president for Hawaii?

A. My duties as the vice president was to be in negotiations with the contracts that we have with the various companies and then servicing those contracts, and primarily handling grievances that are at the third step of appeal and then into arbitration.

Q. OK. I would like you to explain what you mean by "grievances at the third step of appeal."

A. In the grievance procedures that we have in our grievance, there is first-step grievance, which is [p. 7] between a shop steward and shift supervisor or foreman. If that grievance isn't settled at the first step, it's processed to the second step of the grievance procedure. And at that time the local committee would handle the grievance with the department manager. If that grievance is still unresolved, it is sent to my office, and at that point I process a third-step grievance form and submit to the company, normally to the Industrial Relations representative.

Q. And what is the procedure that is followed in a third-step grievance?

MR. RECKTENWALD: Excuse me. Are you talking at any of the airlines that he represents?

MS. MOLLWAY: That's a good objection.

Q. Are the procedures the same –

A. No.

Q. – For all the – OK.

What is the procedure at Hawaiian Airlines when you have a third-step grievance after you submitted this form?

A. At Hawaiian Airlines I have 15-day period to submit a grievance to the third step of appeal, and it's my job to be sure that the grievance is in fact submitted so as not to be caught in the time limits of [p. 8] the appeal.

Q. And is there, then, a hearing at that third step?

A. After the receipt of the grievance forms that I have submitted to the company, I normally call and try to schedule a third-step hearing.

Q. And who at Hawaiian Airlines, when there are third-step grievances, normally participates in a third-step grievance hearing?

MR. RECKTENWALD: I'll object to it. It's vague and ambiguous as to the word "participates."

Q. (By Ms. Mollway) Go ahead.

A. The grievance itself is submitted to the Industrial Relations Department. At the time of this grievance, there was an Industrial Relations Department.

Q. You mean in the fall of 1987?

A. Yes. At the present time there isn't. So at that time I submitted it to the director of Industrial Relations.

Q. Had you ever been involved with a third-step grievance hearing at Hawaiian Airlines before that time?

A. Yes.

Q. OK. And what had happened after the [p. 9] submission of this grievance form to the director of Industrial Relations?

MR. RECKTENWALD: I'll object to the question as compound.

Q. (By Ms. Mollway) Go ahead.

A. In the letters that I sent with the third-step grievance forms, I advised the company that we are appealing the grievance to the third step of appeal, and that upon receipt of my copies of the third step forms, I would contact them and arrange to have a third-step hearing date.

Q. And did you ever have a third-step hearing with Hawaiian Airlines?

MR. RECKTENWALD: I'm sorry. In any case?

MS. MOLLWAY: In any case.

THE WITNESS: Many.

Q. (By Ms. Mollway) OK. And did you yourself attend the hearing?

A. Yes.

Q. OK. How many did you have third-step hearings that you attended at Hawaiian Airlines?

A. Approximately 40 to 50 per year.

Q. Do you remember the level of person who would attend the third-step grievance hearing on behalf of Hawaiian Airlines?

[p. 10] MR. RECKTENWALD: I'll object as vague and ambiguous.

THE WITNESS: I need to have that more clearly stated.

Q. (By Ms. Mollway) OK. You had indicated that on the first step normally the shop steward or the shift supervisor or foreman would deal with the employee. And at the second step there was a local committee that the department would normally – and the department would normally handle that.

At the third step, was there some person higher than a department head who typically would represent Hawaiian Airlines?

MR. RECKTENWALD: Same objection.

THE WITNESS: Not represent, but be in attendance.

Q. (By Ms. Mollway) Be in attendance. OK. And what level of person would typically be in attendance for Hawaiian Airlines?

A. Again, you need to be more clear on that. When you say "what level," are you saying who is in attendance? And if you're saying who is in attendance, who's representing the company's position?

Q. Would it be an employee who would be in company representative there?

[p. 11] A. Yes.

Q. OK. And was it normally someone ranked higher than a department head who would be the representative for the company at the third-step hearing?

A. It would be the department head where the grievance was started.

Q. Was typically an attorney present for Hawaiian Airlines at a third-step hearing?

MR. RECKTENWALD: I'll object. Lack of foundation.

THE WITNESS: No.

Q. (By Ms. Mollway) OK. What typically was different about the third-step hearing from the second-step hearing?

A. The hearing officer.

Q. Is it a hearing officer from outside of Hawaiian Airlines?

A. No, from the company.

Q. OK. Is there an assigned hearing officer whose duty it is to handle these third-step grievance hearings?

MR. RECKTENWALD: I'll object as vague and ambiguous.

THE WITNESS: At the time, it was the director of

* * *

[p. 61] A. Yes, it is.

Q. Has that previously been copied and turned over to anyone in connection with this lawsuit, as far as you know?

A. I think it has, yes.

Q. OK. Could I take a look at that for a second. I think it has, too. I just want to make sure.

MR. RECKTENWALD: Are you doing this pursuant to your subpoena?

MS. MOLLWAY: No. He's just used it to refresh his recollection.

MR. RECKTENWALD: He didn't use the whole file to refresh his recollection.

MS. MOLLWAY: No, Mr. Recktenwald. You can put your objection on the record. That's all you are entitled to.

Q. (By Ms. Mollway) Let me show you what I have marked as Exhibit 1 to your deposition, which is a letter dated July 15th, 1987, from Mr. Matsuzaki to Mr. Norris.

(Exhibit 1 was marked for identification.)

Q. (By Ms. Mollway)Could you please review that for me.

[p. 62] Have you ever seen that before?

A. Yes. It's in my file.

Q. When did you first see this?

A. On or about August 10th.

Q. Who showed it to you?

A. A file of Grant's was submitted to me to be processed through the third step of appeal.

Q. Do you remember who gave it to you?

A. Floyd Baptist.

Q. Let me show you what I will have marked as Exhibit 2.

(Exhibit 2 was marked for identification.)

Q. (By Ms. Mollway) Could you review that. And when you're done, let me know whether you've seen this before, these documents before.

A. Yes, I have.

Q. Did you receive this letter – that is, the first page of Exhibit 2 – on or around August 10, 1987?

A. I would correct my statements made at a previous question, that I was aware of this as of August 4th instead of August 10th.

Q. OK. You were aware of Exhibit 1 as of August 4th; isn't that correct?

[p. 63] A. No, I'm aware of this – I think a question was asked when I was aware of this, and I said around August 10th.

Q. OK. By "this," you mean Grant Norris's dispute with Hawaiian Airlines?

A. Yes. And I would state, then, to correct it to state that it was August 4th versus August 10th.

Q. And what are you basing that correction?

A. That it was the date that I received this, and that shows on the –

Q. Second page?

A. Yes, which is the third-step grievance form.

Q. The second page of Exhibit 2; is that correct?

A. Of Exhibit 2, yes.

Q. And is that your signature there?

A. Yes.

Q. Next to IAM Representative?

A. Yes.

Q. Going back to the earlier question, did you receive the first page on or about August 10?

A. August 4th.

Q. I'm sorry. The first page of Exhibit 2 is the letter dated August 10th, 1987, from Corey [p. 64] Moriyama –

A. Yes.

Q. – to you.

And my question is: Did you receive this first page of Exhibit 2 on or about August 10?

A. Probably August 11.

Q. OK. Also, just so the record is clear, Exhibit 2 is actually –

MR. RECKTENWALD: Various correspondence, different dates.

MS. MOLLWAY: Yes; correct.

Q. Can you look at the third page of Exhibit 2, which is a letter dated August 5th, to Corey Moriyama.

Is that your signature at the bottom?

A. Yes, it is.

Q. And did you send this letter to Mr. Moriyama?

A. Yes.

Q. Can you look at the next page, which has at the top "First Step Grievance Form."

Have you ever seen this before?

A. Yes.

Q. Do you remember about when you first saw this? Is that the August –

[p. 65] A. Along with the rest of the file.

Q. OK. In early August?

A. Yes.

Q. And do you recognize the signature at the bottom of this page?

A. Yes.

Q. Whose signature is that?

A. Floyd Baptist.

Q. Have you ever seen the next document that is part of Exhibit 2, which says "Base Management and Engineering, July 31, 1987, Suspension Hearing"? It's a two-page –

A. "Base Maintenance."

Q. What did I say?

A. "Base Management."

Q. I'm sorry. Base maintenance.

Have you ever seen this two-page document before?

A. Yes, I have.

Q. OK. Do you remember about when you saw it first?

A. With the file.

Q. OK. And that would have been around –

A. August 4th.

Q. August 4th. OK. Did you discuss the –

* * *

[p. 68] THE WITNESS: I should state that when a file is given to me, it would be like I'm giving it to you and saying, "I want this to be processed to the third step. Norman and Justin are at it again," you know. That's the context of – and I accepted the file and did what I was supposed to do as far as filling out the third-step form.

Q. (By Ms. Mollway) OK. I take it from this that you didn't really have a prolonged discussion about the actual activities that were involved?

A. No. I should state that this is one of many grievances that was, you know, presented to me.

Q. At any given time, you have dozens of files that you have to be responsible for; is that correct?

A. Yes.

Q. OK. When was the last time you spoke with Mr. Baptist about Mr. Norris, even if it was after the grievance proceeding?

A. We talked throughout.

Q. In the last month, have you and Mr. Baptist even –

A. Not about Grant Norris.

Q. Let me show you Exhibit 3 to the deposition, which is a letter dated September 10th, 1987, from Howard Ogden to Grant Norris.

[p. 69] (Exhibit 3 was marked for identification.)

Q. (By Ms. Mollway) Have you ever seen this letter before?

A. Yes, I have.

Q. OK. Now, you are listed as someone to receive a carbon copy at the bottom, but I notice that your name appears to be in different type.

Do you remember about when you received your copy of this letter?

A. I think it was on the 17th or – 17th of September.

Q. In other words, about a week after the date?

A. Yes.

Q. Did you have any indication that this letter even existed before you received it?

MR. RECKTENWALD: I'll object as vague and ambiguous.

THE WITNESS: I was not aware that this letter was sent out, and I wasn't aware of it.

Q. (By Ms. Mollway) OK. Did you have any discussion with Mr. Ogden about Mr. Norris?

A. No.

Q. Did you ever discuss this letter with Mr.

* * *

[p. 71] Q OK. Let me show you what has been marked as Exhibit 4 to your deposition.

(Exhibit 4 was marked for identification.)

Q. (By Ms. Mollway) After you've read that, I'll ask you whether you recall receiving it.

A. I've read this.

Q. OK. When did you receive Exhibit 4?

A. On the 16th.

Q. OK. The first paragraph of Exhibit 4 says, "This is to follow up on your conversation today with Mary Ellen Sorensen pertaining to subject grievance hearings."

A. Uh-huh.

Q. Did you have a conversation with Mary Ellen Sorensen pertaining to subject grievance hearings?

A. I had a conversation with Mary Ellen about the scheduling of the grievance.

Q. OK.

A. And that was my discussions with Mary Ellen. It was not about the Grant Norris grievance itself.

Q. OK. In the course of discussing scheduling of the Grant Norris hearings, did anyone mention that Grant was being "reinstated"?

[p. 72] A. Yes.

Q. OK. Who mentioned that?

A. Hannah.

Q. Hannah. What is Hannah's last name?

A. I can't think of her last name.

Q. Do you know her position?

A. She was the secretary for Jean Sonoda.

Q. And who is Jean Sonoda?

A. At the time Jean Sonoda was the vice president of administration, or she was just on the – it might have been a time when she was either retired or resigned or was in the process of retiring from Hawaiian.

Q. And what was discussed between you and Hannah about Grant Norris's "reinstatement"?

A. I called in to find out if Grant's case was scheduled. Mary Ellen wasn't at the phone and Hannah answered. When Hannah answered, and I asked her that I was just trying to get a hold of Mary Ellen to find out if Steve had scheduled Grant's case. And at that point Hannah had mentioned that a letter was dispatched to Grant reinstating him and if I had received that letter, and I said no, I didn't.

Q. OK.

A. So then this letter was sent to me.

[p. 73] Q. And that's exhibit –

A. Exhibit 3. I wasn't even aware that their offer of reinstatement was in fact made to Grant. And at the time all I was trying to do was get a schedule.

Q. Yes, yes. So let me show you Exhibit 5, which may have crossed in the mail with some other earlier exhibits.

(Exhibit 5 was marked for identification.)

Q. (By Ms. Mollway) Let me first back up a little.

When did you – is it your signature on Exhibit 5, the first page?

A. Yes.

Q. OK. And did you send this letter around September 15?

A. Yes.

Q. At the time that you sent Exhibit 5, did you know about the reinstatement?

A. I don't think so. In fact, I didn't know.

Q. OK. So the earliest you could have learned about the reinstatement would have been after you wrote this letter dated September 15th, 1987; is that correct?

A. Yes.

[p. 74] Q. Let me show you what has been marked as Exhibit 6 to your deposition.

(Exhibit 6 was marked for identification.)

Q. (By Ms. Mollway) Please review that and then tell me whether you've ever seen this before.

A. I've seen it.

Q. OK. Can you remember when you first saw this? If it helps you to refer to your own file, which might have a notation, please feel free to do that.

A. Well, somehow I'm not sure if I've got this letter in my file. Yes, I have it.

Q. Can you tell from your copy when you received it?

A. October 2nd.

Q. While you got your file out, is there anything on your copy of Exhibit 3, which is this letter, that indicates when you received Exhibit 3?

A. Which is 3?

Q. This one.

A. September 10th?

Q. Yes. Can you tell when it was mailed to you?

A. It was mailed to me on the 17th.

* * *

[p. 82] the employee with a warning that any further instance or failure to perform the employee's duties in a

responsible manner would result in consideration of more severe disciplinary action?

MR. RECKTENWALD: If I can object, I'll object to the question. It lacks foundation and is vague and ambiguous and assumes facts not in evidence.

THE WITNESS: That is just industry standard.

Q. (By Ms. Mollway) You've seen letters like Exhibit 3 before?

A. Almost all letters with that paragraph.

Q. All reinstatement letters: is that what you mean?

A. All discipline letters.

Q. Do you have any understanding of whether you will be in Honolulu from March 27th through April 15th of this year?

A. I'll be out of Honolulu for an extensive period of time, during that slot that you just mentioned.

Q. OK. You are able to tell me at this time, if you know now when you will be out of town, I would appreciate it.

A. I know that first week of April that I'll be in Bozeman, Montana. The week of April 20th, I

* * *

EXHIBIT NO. 1

[LOGO]
HAWAIIAN
AIRLINES

/s/ Grant Morris 7/15/87
Letter Received – Date – Hand
Deliver Ltr.

July 15, 1987

Mr. Grant T. Norris
1125A 2nd Avenue, Apt. 4
Honolulu, HI 96816

Dear Sir:

This is to advise you that a hearing will be held on Friday, July 17, 1987 at 10:00 a.m. in the office of the Director of Base Maintenance, H. Honma. The charge is Group I – Violations – Reprimand to discharge; Item 8 – Insubordination, failure or refusal to obey instructions or perform work as required.

If you and your union representative is not agreeable to this date, feel free to contact me at x 237.

Respectfully,

/s/ N. Matsuzaki
N. Matsuzaki
Hearing Officer

NM:hpa

cc: H. Honma
H. E Ogden
IRD
IAM – Floyd Baptist
J. Chun

EXHIBIT NO. 2

[LOGO]
HAWAIIAN
AIRLINES

August 10, 1987

Mr. Samson Poomaihealani
Vice President-Hawaii
Airline Machinist District 141
International Association of Machinists
and Aerospace Workers
1449 S. Beretania Street
Honolulu, HI 96814

Dear Sam:

Re: Grievance No. M87-0005
Discharge of Grant T. Norris

Enclosed are two copies of the Step Three Grievance form on the above case.

Please advise when you would like to set a hearing date.

Sincerely,

/s/ Corey A. Moriyama
Corey A. Moriyama
Director
Industrial Relations

Encls.

[LOGO]

Standard Grievance Report

PROCEDURE

The Union shall complete and sign four (4) copies to be distributed to the appropriate Company Representative within fifteen (15) days from the Supervisor's written First Step answer. The Company Representative will sign and date those copies indicating receipt, and return two (2) copies to the Union.

(APPLICABLE STEP NO.) STEP NO. THREE (3)

GRIEVANCE NUMBER M87-0005

COMPANY ADDRESS CODE 532

EMPLOYEE'S NAME (TYPE OR PRINT)
Grant T. Norris

EMPLOYEE'S JOB CLASSIFICATION
A&P Aircraft Mechanic

(PREVIOUS STEP NO.)
Decision on Step No. ONE (1)

(DATE)
was received August 4, 1987

To the Company

Mr. Corey Moriyama
(NAME OF COMPANY OFFICIAL)

The decision rendered in Step No. ONE (1) of the grievance procedure is not satisfactory and appeal is hereby taken to the THIRD (3rd) step of the grievance procedure.
(PREVIOUS STEP) (NUMBER)

IAM Representative /s/ Samson Poomaihealani
(Signature)

Date August 5, 1987

Received by /s/ Corey Moriyama
(Company Representative)

Date 8/10/87

SGR Revised 11/1/86

[LOGO]

Airline Machinists District 141

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

REPRESENTING
24,000 AIRLINE AND
AIRLINE SERVICE
COMPANY
EMPLOYEES

P. O. BOX 391
BURLINGAME,
CALIFORNIA 94010
TELEPHONE
(415) 342-3541

August 5, 1987

Mr. Corey Moriyama
Director-Industrial Relations
Hawaiian Airlines
1164 Bishop St.
Honolulu, Hawaii 96813

Re: Grant T. Norris
M87-0005

Dear Corey:

Enclosed are four copies of Step Three Standard Grievance Report Forms. Please sign and date these copies

indicating receipt and return two copies to me for my records.

I'm also sending you copies of the First Step grievance and the decision of that step.

Upon the return of my copies, signed and dated, I will contact your office to set a hearing date for this grievance.

Sincerely,

/s/ Samson Poomaihealani
Samson Poomaihealani
Vice President-Hawaii
Airline Machinist District 141

Enclosures

[LOGO]

First Step – Grievance Form

IAM – HAWAIIAN AIR

INSTRUCTIONS No. M87-0005

This form is to be completed by the Steward and/or Local Committee Representative and Supervisor and signed by the Complainant. Both the Union and Company shall receive a completed copy.

PART I – To be completed by Steward and/or Local Committee Representative and Employee.

EMPLOYEE'S:

Name Grant Timothy Norris Dept. 532

Shift Starting Time 9:00 PM

Employee No. 4063 Phone: Home 737-5360

Work _____

Seniority Date Feb. 2nd 1987

Classification A & P Aircraft Mechanic

Address 1125A 2nd Ave, Honolulu, Hawaii, 96816

Employee's Days Off (also dates) Wed. & Thurs.

I AUTHORIZE THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS TO REPRESENT ME IN ALL STAGES OF THE GRIEVANCE PROCEDURE IN PRESENTING AND SETTLING OF THE GRIEVANCE.

Grant T. Norris _____ Date Aug. 4th, 1987
Employee's Signature

COMPLAINT NATURE

Applicable Contract Provision(s) Article XV par G. Date of Claimed Violation 8/3/87

Remedy Sought To be reinstated with back pay and made whole

Supervisor First Contacted (name) Norman Matsuzski (date) 7/31/87

Date of Supervisor's Oral Answer see below

CASE FACTS (Give completed details including who, what, where, when, and why. Attach all records, forms, letters, or papers involved.)

Held out of service from 7/31/87

/s/ Floyd H. Baptist — 8/4/87
Steward and/or Local Committee Representative's Signature — Date

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[LOGO]
HAWAIIAN
AIRLINES

AUGUST 03, 2987 [sic]

BASE MAINTENANCE & ENGINEERING
JULY 31, 1987
SUSPENSION HEARING

A HEARING WAS HELD IN THE BASE MAINTENANCE OFFICE JULY 31, 1987 AT 10:00 A.M.

REPRESENTING THE UNION: F. BAPTIST

RESPRESENTING [sic]
THE COMPANY: J. CULAHARA

SUSPENDED EMPLOYEE: G. NORRIS –
DATE OF HIRE:
FEBRUARY 2, 1987

COMPANY OBSERVER: C. ROBINSON

THE HEARING OFFICER PRIOR TO THE START OF THIS HEARING EMPHASIZED THE EMPLOYEE REQUESTED THE LATE SCHEDULED TIME AS STATED ON THE LETTER DATED JULY 15, 1987 NOTIFICATION TO HIM.

QUESTION AT ISSUED [sic]:
EMPLOYEE'S REFUSAL TO SIGN WORK RECORDS FOR WORK PERFORMED BY HIM; SUBSEQUENTLY, SUSPENDED FOR INSUBORDINATION AFTER A DIRECT ORDER WAS GIVEN TO DO SO.

POSITION OF UNION:
EMPLOYEE REFUSAL TO SIGN COMPANY WORK RECORD BASED ON; HE FELT IT WAS UNSAFE FOR WORK PERFORMED.

POSITION OF COMPANY:
THE COMPANY IS RESPONSIBLE FOR THE AIRWORTHINESS OF IT'S AIRCRAFT AND THE PERFORMANCE OF MAINTENANCE IN ACCORDANCE WITH IT'S MANUAL, WHICH MUST ENSURE COMPLIANCE WITH THE FAR'S. ALSO, COMPETENT PERSONNEL, MR. HENRY WONG, QUALITY CONTROL INSPECTOR, WHO IS TECHNICALLY QUALIFIED TO ANALYZE, JUDGE THE MERIT OF EACH ITEM AND MAKE THE DECISION WHETHER OR NOT TO SIGN THE ITEM OFF AS AIRWORTHY.

THE BASE MAINTENANCE LINE MANAGER, MR. JUSTING CULAHARA, PERSONALLY OBSERVES THIS WORK BEING DONE TO THE EXTENT NECESSARY TO INSURE THAT IT IS BEING DONE PROPERLY. HE IS READILY AVAILABLE IN PERSON FOR CONSULTATION. HE SEES ALL AIRCRAFT IN A CONDITION SATISFACTORY TO INSPECTION SECTION PRIOR TO RELEASE FOR FLIGHT.

IN THIS CASE, THE DECISION IN SIGNING A WORK SHEET SIGNIFY ONLY ITEMS COVERED BY HIS SIGNATURE. THIS WAS THE ONLY REQUISITE IN THIS CASE. A DIRECT ORDER WAS GIVEN AND HIS REFUSAL TO COMPLY BROUGHT ABOUT THIS UNHAPPY SITUATION. MANAGEMENT HAS

NEVER MANDATED FOR A "SIGN OFF" FOR WORK NOT DONE BY AN INDIVIDUAL.

DECISION:

MR. GRANT NORRIS TERMINATED AS OF THIS DAY, AUGUST 3, 1987, FOR INSUBORDINATION.

/s/ Norman Matsuzaki
NORMAN MATSUZAKI
ASSISTANT DIRECTOR OF BASE MAINTENANCE
HEARING OFFICER

NM:hpa

cc: GRANT NORRIS
IRD
A.P. WELLS
H.E. OGDEN
C. ROBINSON
H. HONMA
IAM

[LOGO]
HAWAIIAN
AIRLINES

/s/ Grant Morris 7/15/87
Letter Received - Date - Hand Deliver Ltr.

July 15, 1987

Mr. Grant T. Norris
1125A 2nd Avenue, Apt. 4
Honolulu, HI 96816

Dear Sir:

This is to advise you that a hearing will be held on Friday, July 17, 1987 at 10:00 a.m. in the office of the Director of Base Maintenance, H. Honma. The charge is

Group I - Violations - Reprimand to Discharge; item 8 - Insubordination, failure or refusal to obey instructions or perform work as required.

If you and your union representative is not agreeable to this date, feel free to contact me at x 237.

Respectfully,

/s/ N. Matsuzaki
Hearing Officer

NM:hpa

cc: H. Honma
H. E Ogden
IRD
IAM - Floyd Baptist
J. Chun

EXHIBIT NO. 3

[LOGO]
HAWAIIAN
AIRLINES

September 10, 1987

Mr. Grant T. Norris
1125-A 2nd Avenue, #4
Honolulu, HI 96816

Dear Mr. Norris:

I have reviewed your case file very carefully and, as the next appropriate individual in the chain of command, I have decided to mitigate the punishment imposed on you from discharge to suspension without pay for the period August 3, 1987 to September 15, 1987.

You are to report to duty on September 15, 1987 at 1930 hours.

This action being taken by me should not be interpreted by you as an indication that the Company condones your conduct. You are hereby warned that any further instance of failure to perform your duties in a responsible manner will result in consideration of more severe disciplinary action to include discharge.

Very truly yours,

/s/ Howard E. Ogden
Vice President
Maintenance And Engineering

cc: Personnel
Norman Matsuzaki
Samson Poomaihealani/IAM

EXHIBIT NO. 4

[LOGO]
HAWAIIAN
AIRLINES

September 14, 1987

Mr. Samson Po'omaihealani
IAMAW District Lodge 141
1449 South Beretania Street
Honolulu, Hawaii 96814

Re: 3rd Step Grievance Hearings
Enos, Palmer and Otoguru

Dear Sam:

This is to follow up on your conversation today with Mary Ellen Sorensen pertaining to subject grievance hearings.

First, please be advised that Grant Norris has been reinstated, which negates the need for a hearing at the third step. Second, October 5, 1987 is agreeable to me for scheduling the third step hearings for Gordon Palmer, Steven Otoguru and Fred Enos. It is my understanding that the Palmer/Otoguru grievances will be heard at 10:00 am with the Enos hearing to follow (at approximately 11:00 am).

In the event HAL does not have a new Director of Industrial Relations on board, we may want to request a delay as none of these cases involves a discharge.

In any case, all hearings will take place in the HAL conference room at 1164 Bishop Street, Suite 800. Your kokua is appreciated.

Sincerely,

/s/ Stephen R. Thompkins
Stephen R. Thompkins
Vice President-Administration
and Counsel

cc: D. Glover
B. Perry
G. Fleming

EXHIBIT NO. 5

[LOGO]

Airline Machinists District 141

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

REPRESENTING
24,000 AIRLINE AND
AIRLINE SERVICE
COMPANY
EMPLOYEES

P. O. BOX 391
BURLINGAME,
CALIFORNIA 94010
TELEPHONE
(415) 342-3541

September, 15, 1987

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Grant T. Norris
1125A 2nd Ave
Honolulu, Hawaii 96816

Dear Sir and Brother;

Please be advised that the Third Step Appeal of your Grievance No. M87-0005, will be heard on Monday, September 28, 1987 at 1000 hours. The hearing will be held at the Carrier's Bishop Street Office.

Please contact me upon receipt of this notice to ensure that I have all of the pertinent information regarding your case. The phone number of my office is (808) 973-0141 and I'm located at 1449 S. Beretania St. your immediate response will be greatly appreciated.

Sincerely and Fraternally,

/s/ Samson Poomaihealani
Vice President- Hawaii
Airline Machinist District 141

cc: Floyd Baptist (3)
File

EXHIBIT NO. 6

[LOGO]
HAWAIIAN
AIRLINES

September 28, 1987

Mr. Grant T. Norris
1126 N. AltaDena Dr.
Pasadena, CA 91107

Dear Mr. Norris,

I have received an official postal receipt indicating that you received my 10 September letter to you on 21 September 1987.

I must further advise you that the reinstatement offer made therein will be held until 2400, Friday 2 October 1987. If I do not receive a positive reply from you by that time, I shall consider that you do not desire to be reinstated.

Sincerly [sic],

/s/ Howard E. Ogden
Howard E. Ogden
Vice President
Maintenance & Engineering

cc: Personnel
J. Honma
C. Robinson

Copy: Samson Poomaihealani/IAM

[p. 1] IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

GRANT T. NORRIS, Plaintiff, vs. HAWAIIAN AIRLINES, INC., Defendant.	)	CIVIL NO. 87-3894-12
GRANT T. NORRIS, Plaintiff, vs. PAUL J. FINAZZO; HOWARD E. OGDEN; HATSUO HONMA; and DOES 1-50, Defendants.	)	CIVIL NO. 89-2904-09 *Volume 1*

DEPOSITION OF STEPHEN THOMPKINS, ESQ.,

Taken on behalf of Plaintiff at the offices of Cades Schutte Fleming & Wright, 1000 Bishop Street, Honolulu, Hawaii, 96813, commencing at 9:16 a.m. on Friday, June 8, 1990.

REPORTED BY: JOAN IZUMIGAWA, CSR No. 136
Notary Public, State of Hawaii

[p. 4] * * *

STEPHEN THOMKINS, ESQ.,

Being first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. BOYLE:

Q Would you state your name for the record, please.

A Yes. Stephen, S T E P H E N, middle initial R, last name Thompkins, T H O M P K I N S.

Q What is your residence address?

A 3169 Diamond Head Road, Honolulu, 96815.

Q And your business address?

A 1000 Bishop Street.

Q You work on the 9th – your offices are on the 9th floor?

A That's correct.

Q You've been there for, what?, a month, approximately?

A I would say approximately a month.

Q Prior to that you were – you maintained your offices at the 1164 address?

A That's correct. 1164 Bishop Street, Suite 800.

Q Have you ever had your deposition taken before?

A Yes.

* * *

[p. 38] Honma, and IAM. I ask you if this refreshes your recollection as to when you first heard about Mr. Norris or read about Mr. Norris.

A No. I would say that I had heard of an individual that was the subject of this action identified here as – how is it identified here? "Suspended Employee: Grant Norris." I had heard of the subject matter of this prior to the date of this letter.

Q Okay. Well, I believe we've been able to agree that Mr. Norris was asked to leave the premises, the base on the morning of July 15th. There's been some controversy between your attorneys and me as to what exactly he was told that morning and what legally you should call it, whether it's a suspension pending hearing or whatever it's called. He appears to have left the base on the morning of the 15th of July 1987 and has not worked at Hawaiian Airlines in any capacity since that time.

So using that day, that is, July – the morning of July 15, 1987, can you tell me if that refreshes your recollection as to when you first heard about Grant Norris.

A Well, it – it does place it within the general time frame.

And perhaps I'd better explain a little bit. [p. 39] Under our procedures, if there is an incident in the work place which is likely to result or may well result in some kind of disciplinary action, or in the event there's an incident where a supervisor deems it appropriate for an individual to leave the work place, we go through a procedure called holding out of service. When – when a – an employee is held out of service, essentially they are removed from the work place or asked to leave the work place, and they are somewhat in a limbo status at that point in time.

It would have been sometime within a few days after that, I would assume, that I would have been called by the supervisor involved, or the manager, and advised that we held an employee out of service, These were the circumstances, asking for guidance.

Q All right. Did you receive such a call from anyone in connection with Mr. Norris?

A I did. I received a call from – to the best of my recollection, from Mr. Norman Matsuzaki.

Q Again, was this a few days subsequent to July 15? I assume that you do not recall the exact date.

A I don't recall the exact date.

Q Sure.

A But if the incident – if he was removed on the 15th or held out of service on the 15th, you know, I –

* * *

[p. 79] THOMPKINS 6/8/90

walk through and handle disciplinary procedures.

Q When you discussed the contract with Mr. Ogden, what exactly did you discuss, or can you recall?

A I can't recall.

Mr. Hipp: All right. In these conversations with Mr. Ogden, I'm going to instruct you not to answer any part of any conversation you had where you were developing your case for arbitration, if you were, with Mr. Ogden. I'm going to assert the attorney work product privilege as to any development of the case as opposed to providing personnel advice –

The Witness: Okay.

Mr. Hipp: – when you were a personnel – when you had your personnel hat on.

The Witness: Very well.

Q (By Mr. Boyle) Well, see, that's the difficulty I'm having here, because I – if you're providing answers to Norman Matsuzaki based upon – by the way, did you – when you discussed Mr. Matsuzaki's hypothetical with him –

A Mm-hm.

Q – did you discuss the contract at all, the collective bargaining agreement?

A I don't recall specifically, but I – I believe that I did point out to Norman that the labor agreement [p. 80] between the Iam and the employees represented by the Iam and the company did – does contain a specific provision that required Iam members that are represented within that bargaining unit to sign and document the work that they performed as A&p mechanics.

Q Were you telling that to him while you were wearing your personnel hat, or were you telling that to him as an attorney who had read a contract?

A No. That was as my – in my personnel function.

Q When do you cross the line when you were discussing a contract with a fellow employee of Hawaiian Airlines? In other words – let me withdraw that question. It's rather vague.

I take it that on several occasions, you've had the opportunity to discuss the collective bargaining agreement between Hawaiian Airlines and the Iam with fellow employees – managerial employees at Hawaiian Airlines. Is that a fair statement?

A I think it's a fair assumption, yes.

Q Can you tell me under what circumstances you are discussing – can you give me an idea of what constitutes legal advice about that contract, about that collective bargaining agreement, legal advice to Mr. Finazzo or someone else who – [p. 81]

A Mm-hm.

Q – wants to know if the company can take a certain action; and what constitutes advice in the area of human resources.

Mr. Hipp: I'll object to that question as vague and ambiguous as to "give me an idea."

Q (By Mr. Boyle) What's the criteria?

A Well, let me throw out a few examples. Certainly any time I would be advising management as to the labor agreement in connection with litigation that is in process.

Q There's a lawsuit filed?

A That's correct.

And as it pertains to an actual arbitration that – for which we are preparing or conducting that is actually in the arbitration procedure or pertaining to my development of the case for arbitration.

Other advice as to the general nature of the labor agreement, specific provisions of the labor agreement would be provided under my personnel function.

Q If someone goes to you in the company and they say, "We want to get rid of a non-" – strike that.

Let's go back to the example you just gave me, the arbitration. Do you have to be involved in the arbitration for it to – for your advice to be that of an [p. 82] attorney-client?

Mr. Hipp: I'll object to that as vague and ambiguous as to what the word "involved" means.

Q (By Mr. Boyle) Well, in other words, you've talked about preparing the company's case and representing the company and so forth and so on.

A Right, mm-hm.

Q Do you have to be actively involved in the day-to-day representation of the company for your advice to be covered by the attorney-client privilege?

Mr. Hipp: I'll object to that. That's incredibly vague and ambiguous as to "actively involved in the day-to-day operation." Of course this is – vague and ambiguous as to what "actively involved" means.

Mr. Boyle: Don't you want to speak for another half hour, Counsel, and coach him the way you do all your one of his manager was appropriate, that he take that action promptly to alleviate any hardship or to alleviate any potential back pay award as we worked our way through the grievance system.

Q Okay. But you don't say anything here about the starting of any processes for disciplinary action or termination or eventual termination, do you?

Mr. Hipp: I'll object.

A I don't have the document –

Mr. Hipp: The document will speak for itself, and Mr. Boyle has the document in front of him.

Mr. Boyle: Well, I'm sorry, Counsel. I thought that Mr. Thompkins had read it.

A I read it, but I hadn't memorized it.

Q (By Mr. Boyle) Well, take a look specifically at the second sentence of that.

A All right.

Q Was there any doubt in your mind as of the time [p. 89] that that document – as of the time that that document was prepared by you that Mr. Norris had been terminated by the company?

A I think you need to understand, sir, that the – that the procedures at Hawaiian Airlines as contained in the labor agreement contemplate and provide for a fairly substantial process from the time an individual is held out of service up through the grievance procedure and through arbitration. And there – you know, use of the word "termination," you know, applies to the beginning of the process, and that's – that's what had occurred prior to the date of this piece of correspondence. And in fact, I believe that the matter was within the grievance process and in effect Mr. Norris was not at work at that time.

Q There's nothing in here about a grievance process, is there?

A Well, sir, if you'll give me back and let me look and see what it –

I know I discussed with Mr. Ogden the fact that there was a grievance process.

Q You talked about the grievance procedure?

A Yes, sir, that's correct.

Q You talked about the third step of the grievance procedure? [p. 90]

A Yes, sir. That does reflect that there's a grievance procedure in the process.

Q But the second sentence of the memo states rather emphatically that – virtually that there is no doubt that Mr. Matsuzaki had terminated Mr. Norris as of August 3, 1987.

A That's only the beginning of the procedure.

Q But that's not stated in the letter.

A Well, it is from the – I think you have to understand the grievance procedure in effect between the parties. There's no termination that is final until it's worked its way all through the grievance procedure that's initiated by the employee and the union. And a termination is not final until there's a final arbitrator's decision.

Q Yes, I understand that's the legal theory, but that's not what the letter says, is it?

A It's more than the legal theory. It's what the contract provides, sir.

Q But that's not what your letter says, and your letter was written to Mr. Ogden, right?

Mr. Hipp: I'll object to that. The letter speaks for itself. It also has reference to the grievance procedure, contrary to –

Q (By Mr. Boyle) And the letter also says that [p. 91] there is no doubt that Mr. Matsuzaki terminated Mr. Norris, does it not?

A That – it says that he was in fact terminated on August 3rd, 1987. That's the beginning of the procedure.

Q Okay. We're not talking about – when you wrote that letter – I mean, we're all going to be in front of the jury, hopefully, in a few weeks. There was no term of art with your use – strike that.

You weren't using a particular term of art when you used the term "terminate." were you?

Mr. Hipp: I'll object to that. That calls for pure speculation. He's already testified as to what the procedure is.

Q (By Mr. Boyle) I don't care what the procedure is. You used the term "terminate."

A Well, I think you have to understand what the procedure is. And you can't –

Q Did you use the term "terminate," Mr. Thompkins?

A The letter speaks for itself, sir.

Q Thank you.

Did you regard termination to be a – excuse me. Did you regard termination to have been the punishment against Mr. Norris? [p. 92]

A I'm not sure I understand your question.

Q Well, you state in your second paragraph," If it is appropriate to impose some punishment against Mr. Norris other than termination.

A Mm-hm.

Q I assume from that that your position was that Mr. Matsuzaki had imposed termination as the punishment for Mr. Norris's conduct. [p. 98]

Mr. Hipp: I'll object. The letter speaks for itself as to what is said in the letter.

A In effect, this goes to –

Mr. Boyle: Well, if that were true, Counsel, we wouldn't need judges to interpret the law, because there would be someone like you always to say that the decision speaks for itself. This man wrote the document and I'm trying to find out what he meant by the document.)

Mr. Hipp: That's the question you were responding to that you were cut off on.

A In essence, the answer to that question requires an explanation again of the grievance procedure.

From the time Mr. Norris was held out of service or covered by the provisions of the labor agreement between the International Association of Machinists representing the mechanics and Hawaiian Airlines, which provides for a multi-phase and multi-step grievance procedure; and

any action taken by Mr. Matsuzaki was the initiation of a multi-phase procedure under the grievance process; and that no action initiated by Mr. Matsuzaki which may be labeled a termination or otherwise is complete until such time as the final decision is rendered by an arbitrator as far as the case [p. 99] is processed.

Q (By Mr. Boyle) That assumes, doesn't it, that the person who has been disciplined is going to carry it on?

A Well, sir, it – it's clear from the memo – And that's what I'm trying to get to – that in fact it was being carried on. If I could see the exhibit that was presented to me, sir. It's clear that at this point in time, that the grievance process was initiated, and I have explained and – before as I've indicated in my discussions with Mr. Ogden that he is the vice president of that department, was in a position to review the actions in process, and make a decision on that case. And that is the purpose for the text of this – this document: encouraging Mr. Ogden to review the matter and determine what kind of action in the purview of his authority that was deemed appropriate, sir.

Q Was there a decision at the time this letter – at the time this letter was dictated, at the time this document was prepared, had there been a decision with respect to Mr. Norris's continued employment by Hawaiian Airlines?

Mr. Hipp: Object to that as vague and ambiguous as to the word "decision," which has multiple meanings. [p. 100]

Mr. Boyle: You can't be serious, Counsel.

Mr. Hipp: Well, he's described a process to you, Mr. Boyle.

Mr. Boyle: I know what he's described, Counsel.

Mr. Hipp: Your ignorance of the process does not excuse you in your asking of questions, although it may be an excuse for your questions.

Mr. Boyle: Oh, Lord. Oh, Lord.

A The position of Mr. Matsuzaki at his level was that termination was appropriate –

Q (By Mr. Boyle) Right.

A – for the conduct engaged in by Mr. Norris, but that's the only – only the beginning of a very lengthy procedure.

Q That was only the beginning if Mr. Norris continued to stay in that – what you have referred to as "process"?

A I'm not sure that – is that a question, sir?

Q The company had made a decision?

A That is not correct.

Q Mr. Matsuzaki had certainly made a decision.

A Only within the parameters of what his function was at that time, which is at the – the basic first step. [p. 101]

Q I don't understand your – you keep using this term "parameters," "only within the parameters." Mr.

Matsuzaki had terminated Mr. Norris's employment; is that not correct?

A He had initiated a process under the labor agreement in which he had, at the first step of the procedure, rendered his opinion and decision.

Q You know, I have looked – I have just heard your answer –

A Mm-hm.

Q – and I have looked at Mr. Matsuzaki's decision in all four corners of the document, and I see nothing about initiating a process. I do not see that word anywhere. I do see the word "terminate." I do not see anything about initiating processes or parameters or any of the other words you used in describing Mr. Matsuzaki's decision to terminate Grant Norris. Can you find those words for me in Mr. Matsuzaki's decision.

Mr. Hipp: I'll object to that as obviously vague and ambiguous, a speech by Mr. Boyle, and the document speaks for itself as to what words it contains.

A The fact is that the – the process was initiated by Mr. Matsuzaki's letter, and in fact a grievance was filed and pursued by the grievant in this case. [p. 102]

Q (By Mr. Boyle) Where does it say that in Mr. Matsuzaki's decision, Mr. Thompkins?

Mr. Hipp: I'll object to that as assuming facts not in evidence: that it has to say that in Mr. Matsuzaki's decision for that to be the case.

A In effect, under the procedures in existence at our company, this hearing is the first step in the grievance procedure.

Q (By Mr. Boyle) When – I'm not talking about the hearing. I'm talking about the decision.

A Well, the decision was –

Q It says – on Page 2 of the August 3, 1987, memo by Mr. Matsuzaki, it says "Decision. Mr. Grant Norris terminated as of this date, August 3, 1987, for insubordination."

A Okay.

Q Is that what you – is that statement by Mr. Matsuzaki what you refer to as initiating the process?

A That's correct.

Q May I have your letter back.

A Yes, sir.

Q What did you mean when you used the term "whether or not we" – or the phrase "whether or not we wish to sustain the action of Mr. Matsuzaki"? You mean uphold his decision? [p. 103]

A I would think that means the same, yes.

Q As of August 17, 1987, did you agree or disagree with the decision by Mr. Matsuzaki?

A I did neither.

Q You didn't have an opinion about it one way or another?

A No, I did not.

Q You – the reason I ask you that question is that you state in the third paragraph, "I am aware that you feel it would violate one or both of the privileges.

A That's correct.

Q You know, it's my understanding that – strike that.

Why did you send a memo to Mr. Ogden in the first place?

A I don't recall specifically whether I couldn't reach him on the phone or what – the specific reason why it was placed in a memo form.

Q Well, to some extent was this memo to put down what – or to – I guess the term is used "to memorialize." I do not like that term. But was one of the reasons that you dictated this memo to Howard Ogden to set forth what your opinions were with respect to the wisdom of the action, Mr. Matsuzaki's actions?

A No, that's not correct.

Q As you sit here today, can you think of – do you have either generally or specifically any recollection of why you dictated this memo to Mr. Ogden?

A Generally it would have been to encourage him to review the matter and be cognizant of the fact that he is the vice president of that department, had the responsibility of reviewing it and making a determination [p. 106] as to the company's course of action at that point pursuant to the labor agreement.

Q At this point were you aware of whether or not Mr. Norris had gone to the Federal Aviation Administration?

A No.

Q At this point in time, were you aware of whether or not any other employees had gone to the Federal Aviation Administration?

A No.

Q In your position either as personnel – in your position in Ird or as counsel, did you have as of August 17, 1987 the power to overrule a decision made by Mr. Matsuzaki?

A No.

Q As of August 17th, 1987, did Mr. Ogden have the power to overrule a decision made by Mr. Matsuzaki?

A Yes.

Q Is there any reason why you communicated on August 17, 1987, with Mr. Ogden as opposed to Mr. Matsuzaki?

A Well, because it was in the grievance process and Mr. Ogden is the – the person to review any initial decision made by Mr. Matsuzaki.

Q You state here by the way, is there a [p. 107] difference between a termination of employment and a suspension without pay for a period of time?

A Yes.

Q Were you suggesting in this memo to Mr. Ogden that you were not of the opinion that Mr. Matsuzaki's

order of termination of employment was appropriate under the circumstances?

A Sir, I'm sorry. There's a double negative there, and I – you said something about "not," and I – could you rephrase the question, perhaps, and help me a little bit.

Q Okay. I'm sorry if I misstated the question – or rather, misspoke.

As of August 17, 1987, when you sent this memo to Mr. Ogden, were you of the opinion that Mr. Matsuzaki's order terminating the employment of Grant Norris was inappropriate under the circumstances?

A I had no opinion at that point.

Q Again, I'm not attempting to argue with you, but if you had no opinion at that point, why did you tell Mr. Ogden that inviting – you appear to invite him to confer with you – well, strike that.

In the third paragraph you state, "I am aware that other problems exist pertaining to this case, however I would suggest that we review the case file and [p. 108] if it appears that some disciplinary action other than termination is appropriate that you take prompt action to modify Mr. Matsuzaki's order," and then it goes on.

A Mm-hm.

Q You seem here to have been suggesting that Mr. Matsuzaki – Mr. Ogden confer with you about the – possibly overturning Mr. Matsuzaki's decision.

A No, I don't think that was my suggestion, sir. I think my suggestion is that he, in performance of his

functions as the vice president of maintenance under the grievance process, review this, as he would be expected to do in any case, and review the process as it had gone on to that point and make his own independent decisions as to what course of action was appropriate; recognizing that that, from my perspective, is what the grievance process is all about at Hawaiian Airlines and why we provide for a several-step process where any action taken by an individual in the company pertaining to an employee can be reviewed by different individuals from a different perspective in determining what the final action should be.

And that's the reason why this is essentially a personnel function letter. It – it is advisory to Mr. Ogden from the personnel standpoint and the Ird standpoint as to the functions that he is expected to [p. 109] perform in his position.

Q But why should this – well, strike that.

Did you have any other personnel problems going on at the time?

A Oh, I don't recall, sir.

Mr. Hipp: It's time for lunch.

Mr. Boyle: So it is. (Recessed for lunch: 12:08 p.m.)

* * *

[p. 110] (Resumed: 1:26 p. m.)

Q (By Mr. Boyle) Did Mr. Ogden ever get back to you with respect to taking another disciplinary action other than termination?

Mr. Hipp: I'll object to that as vague and ambiguous.

A Certainly, sir, at some point in time I saw his decision letter, if that's –

Q (By Mr. Boyle) What decision letter?

A – what you're referring to. Mr. Ogden, I believe, at some juncture did issue a letter to the grievant indicating that he had taken the matter under consideration and mitigated the action that had been taken.

Q What was the genesis of that letter?

A When you say "the genesis," can you explain that for me, please.

Q What was the origin of the letter? Was the letter your idea, Mr. Thompkins?

Mr. Hipp: I'll object to that. Assuming facts not in evidence.

Mr. Boyle: "Was the letter not your idea"? How could that assume a state of facts not in evidence?

Mr. Hipp: You asked what the genesis of the letter was. You didn't establish that he knew what the [p. 111] genesis of the letter was.

Mr. Boyle: No. He had already asked me what I meant by the term "genesis," which I thought was a book in the Old Testament.

In any event, let's read back my question. This can take, Counsel – both counsel, as long as you wish to take.

(The last question was read by the reporter.)

Mr. Hipp: I'll object to that as a compound question.

Mr. Boyle: It's not a compound question. It couldn't possibly be a compound question.

Mr. Hipp: Two different questions.

Mr. Boyle: That's not a compound question. You ought to learn your objections. You ought to stay in either labor law or practice litigation, because –

Q (By Mr. Boyle) In any event, what was the origin of Mr. Ogden's letter, if you know?

A Only by what I recall from seeing on the letter itself. I believe it was a letter signed by Mr. Howard Ogden.

Q I know it was signed by Mr. Ogden. Was it prepared by Mr. Ogden?

A I'm afraid I don't know.

Q You don't know – you have no idea who prepared [p. 112] that letter for Mr. Ogden's signature?

A I do not know. I would assume Mr. Ogden may have – he signed it so I assume he prepared it, but I don't know.

Q Did you have any discussion with Mr. Ogden prior to that letter being sent?

A I had several discussions with Mr. Ogden, as I previously testified to.

Q Okay. Fine. But between – what letter, first of all, are we referring to? Are you referring to the letter which

– I believe it's dated September 10, 1987, to Mr. Norris from Mr. Ogden. At least it appears to have been signed by Mr. Ogden.

A Yes, that's the letter to which I refer.

Q Okay. May I have that back.

Your memo to Mr. Ogden dated August 17, 1987, asks Mr. Ogden to get back to you at his earliest – what the initial item is appears to be – I – I just can't read the numbers at the bottom.

Then on the right-hand side it says, "Mary Ellen – Check with S. T. Friday a. m. if decision made. Must let Ray Sakai know. M. W."

Q May I have that back?

A Yes, sir.

Q Thank you.

Do you recall what the decision was by the Hawaii state unemployment division on Grant Norris's claim for unemployment benefits?

A I don't recall the text of their decision, no, I don't.

Q Do you recall generally what the decision found?

A I think that he had applied for unemployment compensation, and essentially my recollection is that it was determined in his favor. But the text of it I don't recall.

Q Did you have any communications with Mr. Ogden [p. 121] between Thompkins 1 and Thompkins 2?

A Well, let me see Thompkins 1 and Thompkins 2, if I may.

Sir, I don't know.

Q Why were you asking Mr. Ogden – you appear to be asking Mr. Ogden – you state in this memo, "we will need a decision as to what position Ha will take," Hawaiian Airlines will take. Why were you asking Mr. Ogden for such a decision?

A Okay. Essentially, as I've stated earlier, within the procedure we have at Hawaiian Airlines, an action that is initiated, such as in this case, by Mr. Matsuzaki, is not a final action until it goes through the entire process. And the question which I was asking of Mr. Ogden is whether –

Q Are we – I'm sorry.

A – or not he had made a decision as yet at his level of review of the action initiated by Mr. Matsuzaki pertaining to Grant Norris, because that information I felt would be relevant for submission one way or the other to the Department of Labor.

Mr. Boyle: Let me have this marked next in order.

(Exhibit 3 was marked for identification.)

[p. 122] Q (By Mr. Boyle) Can you take a look at Mr. Ogden's letter which has been marked as Thompkins 3.

A The first page of this, yes, sir. I have.

Q Okay.

Mr. Hipp: Why don't you look at the second page.

A Yes, sir.

Q (By Mr. Boyle) Between the date of Thompkins 2, which is September 1, 1987 and the date of Thompkins 3, September 10th, 1987, received in the administration department on, it appears to be, September 11th, 1987 – can you tell me whether or not you can tell if it was received on September 11th or not.

A I can't tell from this stamp for sure because that – the reproduction doesn't appear to be very good with that.

Q Right.

A But from the entire text of the document, including a stamp at the lower right-hand side reflecting a date September 12th, it would appear that in all probability it was received by the administration department on September 11.

Q Okay. Now, between September 1st and September 11th did you have any communication with anyone regarding [p. 123] the Norris matter?

A Oh, yes. I did.

Q Who did you have communications with?

A Sam Poomaihealani – That's P O mark OMAIHELANI – who is the union contact at my level. And Sam, I believe, inquired of me on at least one occasion, if not more than one, as to whether or not any – the action taken involving Mr. Norris would be mitigated or whether – what the company's position was going to be. I do recall calls from Sam to that effect.

Q Well, first of all, let me try and break this down –

A Okay, sir.

Q – in an orderly fashion. How many calls did you have – or rather, how many communications did you have with Sam Poomaihealani between the 1st and the 14th of September 1987?

A Well, I'm – okay. I – I know I received communications from Sam. Now, whether or not – what was – between September 1st and September – did you say the 10th?

Q Excuse me. The 11th.

A Okay.

Q I'm just trying to understand who you spoke to.

A I understand, but within that parameters I [p. 124]

Q How was this filed? Strike that.

This letter – oh, I know where this came from. Oh, okay.

Down at the bottom it says, "9/25/87. Per S. Thompkins asked N. Matsuzaki or H. Ogden through Helen" [p. 128] – "Helen," is it, or "Helene"?

A Let me, if I may, look at it and see the text.

Q Yes.

A Okay. This appears to be – it's a typewritten entry bearing the date 9/25/87. It's not a signed document, but it purports to have been typed in here by Marge Warren,

again the director of personnel. And it appears to be a memo of actions taken by Mrs. Warren at my request in essence asking that she contact either Norman or Howard through Helen, which should be "Helene" – It's a secretary, I would assume – through Helene in maintenance asking that they – they go ahead and write to Mr. Norris via regular mail and telling him that the company had received the return receipt showing that he had received the decision letter and advising him that Hawaiian would hold his position open until October 2nd – And that was – appears to be a little bit variable, depending on when the letter that was being requested went out – and then advising that – Mr. Norris that if we didn't hear from him, we assumed that he wasn't really interested in the position.

Q On the – strike that.

Did you ever discuss following your receipt of this letter – and I may have asked you this question. If I did, I apologize. But did you ever discuss the [p. 129] contents of this letter with Mr. Ogden?

Mr. Hipp: I assume you're referring to the September 10th letter, not the second page of Exhibit 3.

Mr. Boyle: Yes. The September 10th letter.

Q (By Mr. Boyle) Did you ever discuss the September 10th letter with Mr. Ogden?

A I have no recollection of specifically discussing the September 10th letter with Mr. Ogden.

You mean prior to the time he issued it? Other than –

Q No, no, no. I mean – as I understand your testimony, you had no communications with – or excuse me. You did not have any discussion with Mr. Ogden about the letter of September 10, 1987, prior to the time he actually signed it and sent it out.

A Not – not the letter, but in my overall discussions with Howard, again, I advised him of the full grievance procedure, would have advised him of the standard procedures that we utilized. I would have advised him of formats for decision letters or action letters or where to get those.

Q Well, specifically I'm – I'm curious about the language in the third paragraph of the letter that states, "This action being taken by me should not be interpreted by you as an indication that the Company [p. 130] condones your conduct. You are hereby warned that any further instance of failure to perform your duties in a responsible manner will result in consideration of more severe disciplinary action to include discharge."

A Okay, sir.

Q Did you ever discuss that language with Mr. Ogden or anybody else?

A As applies to this specific letter, I have no recollection. However, that's boilerplate language that is included in almost all, if not all, disciplinary action letters which are other than termination letters. And I would have discussed that with the union in the past. I would have discussed that with essentially any company individuals involved in any grievance process. That's a standard boilerplate letter – language.

Q When you say "standard boilerplate," just remember that the people – your deposition or portions of your deposition may be read to the jury.

A I understand.

Q The language I'm referring to is the paragraph – the third paragraph. I've already read it into the record. When you say that is standard boilerplate language, what do you mean "boilerplate language," Mr. Thompkins?

A In essence, any time the – Hawaiian Airlines [p. 131] takes an action, other than a termination for cause, involving an employee misconduct or employee conduct or whatever it may be, the letters do contain a caution to the employee advising them that, "Simply because the company has decided to do something other than terminate you for an offense which ordinarily would entitle the company to – to terminate or consider terminating you," the fact that the company takes some more lenient action shouldn't be construed by the recipient of the correspondence as being condoning of any conduct which is improper or a violation of the regulations. And as a caution to them, that any misconduct in the future would provide a basis for the company considering more serious types of disciplinary action up to and including separation from employment for cause. And that's part of the graduated procedure: providing notice to any recipient of this kind of correspondence that they must watch their conduct in the future.

Q Whether it's the same misconduct or different misconduct, the company will be –

A Well, will have to consider the fact that there is a prior disciplinary action in the record in determining what kind of action is appropriate for future instances of misconduct.

I think that, if I may, has developed, at least [p. 132] in our context, over a long relationship of union-management relations where the union, of course, encourages the company to make sure employees are fully aware of where they stand and what the perils are for future misconduct so it isn't a surprise to anybody if there is any future malfeasance or misconduct.

Q You appear to have gotten involved in this matter to the extent of asking – strike that.

Following your receipt of this letter on September 11, 1987, did you have any discussions with Mr. Matsuzaki or Mr. Ogden about Mr. Ogden's letter?

A I have vague recollections of calling their office – I don't recall with whom I may have talked, whether it would have been – it probably would have been Mr. Ogden – and suggesting that since the time frame set for Mr. Norris to return to work had passed without us having received any communication, that that would probably need to be extended until we were sure that he knew that he was to come back to work.

Q Well, as you saw, Marge Warren put a notation in here on September 25, 1987.

A I would think, sir, my communication would have been prior to that because I – I – my recollection – And again, it's a vague recollection – is that I called and said, "Well, that's a date in here, and we – have [p. 133]

you received back the certified mail return receipt yet? And if you haven't, if you're able to locate him, then you – you ought to extend the period of time in which he would have an option of returning for his return."

And then the – the comments to Mrs. Warren – from Mrs. Warren were probably to the effect "Now you've got it. You know when he got it. Let's give him – you know, go back to him with some communication and let him know that, you know, the return is still open to him."

Q After Mr. Ogden – can you tell me why you were involved in this matter at all after Mr. Ogden had sent

* * *

[p. 137] Mr. Boyle: That you are not going to do that at the time of trial, correct, Counsel?

Mr. Hipp: Yes, that's correct.

Mr. Boyle: Thank you.

Q (By Mr. Boyle) Taking these documents in order, I'd now like to show you correspondence – what appears to be a copy of correspondence from you to Mr. Poomaihealani. It's dated September 14, 1987. I'd like to ask the court reporter to mark this and then I would like to ask you, Mr. Thompkins, to review it.

(Exhibit 4 was marked for identification.)

Mr. Boyle: While you're doing that, we'll take a 1-minute break.

(Recess: 2: 18 p. m. to 2: 21 p. m.)

Q (By Mr. Boyle) Who is Mary Ellen Sorensen?

A Mary Ellen Sorensen is my secretary, one of my secretaries.

Q Apparently Mr. Poomaihealani called you on September 14th, 1987?

[p. 138] Mr. Hipp: Could you give him the document.

A It would appear so, yes.

Q (By Mr. Boyle) He spoke to your secretary?

A Yes. Mrs. Sorensen.

Q Did he speak to you?

A Not to my recollection, but I don't recall specifically.

Q What was the purpose of your sending Mr. Poomaihealani that letter?

A The letter refers to the scheduling of third step hearings involving grievances that were pending, and it would have been to confirm with Mr. Poomaihealani that it was permissible to establish a third step hearing for three individuals on October 5th at 10: 00 o'clock with a second – with two of them at 10: 00 and one at 11: 00. It advises him that Grant Norris was reinstated ; and the fact that insofar as the termination third step hearing, that that would not be necessary as a result of the reinstatement ; and advises him that apparently a new director of industrial relations wasn't on board at that time, and as none of the cases that we had at that time involved any discharge, that it would – it would be – the company may want to request a delay.

Q What is the termination third step hearing?

A I'm sorry, sir?

[p. 139] Q What is the termination third step hearing? I thought you used that term.

A A third step hearing is – exists within the grievance procedure of Hawaiian Airlines for any and all kinds of grievances which come up involving employees and the company. A third step termination hearing would be in a case involving an actual termination that was going to be heard at the third step in regard to the termination. And it just really is – is a third step hearing involving a case in which termination was an issue.

Q Well, let's assume for a moment that Mr. Norris had gone through that third step. What would it have involved?

A A third step hearing would involve a hearing before the vice president of the department concerned or the director of industrial relations –

Q Okay. Let's – let me go through this. We have the hearing at which Mr. Matsuzaki presided as the hearings officer.

A That's correct.

Q Assuming that Mr. Norris stayed in what you have repeatedly referred to here today as the process, there would have been a third step hearing?

A That's correct.

[p. 140] Q Okay. What would the third step hearing have entailed?

A Well, by procedure there would have been a third step hearing officer, which in the case involving Mr. Norris would have been Howard Ogden, at which time the company would have made a presentation as to the actions it had taken and introduced individuals to explain the actions that they had taken and what they had observed or the substance of the – the facts and circumstances surrounding the incident which gave rise to a disciplinary action.

The union would present its basic verbal position as to what the union posture was and what the grievant felt about the situation, and they have the opportunity to present anyone that they want.

These are non-adversarial proceedings. There's no sworn testimony. It's a get-together with a different authority than – than the person making the initial decision and in this case would have been at the third step.

Q What's the first step?

A First step is basically a meeting or, if you wish, a hearing involving the action individual, the person who is taking the initial action. Oftentimes it will be the supervisor or someone directly in the chain [p. 141] of command, if you want to use the chain of command, but it – term, but someone in the hierarchy in a direct supervisory relationship to the individual involved.

Q Does there always have to be a first step?

A A first step, yes, as – as – of some form and substance, whether or not it's sitting down in a formal environment or in a meeting room. It does not necessarily

have to approach that kind of formality, but yes, there has to be a first step.

Q To your knowledge, was there a first step in the Norris matter?

A To my knowledge, the union considered Mr. Matsuzaki's meeting with – with Grant Norris as the first step.

Q What meeting are we talking about?

A The one – I believe it was July 31st. Perhaps the 15th. You – if I could.

Q Yes, please. If you could, I –

A I think you have –

Q Do you want to take a look at this?

A I guess it's not – it's that letter which is date – has a date of August 3rd relating to a July 31st, quote, unquote, suspension hearing.

Q Was the July 31st suspension hearing the first step or second step?

[p. 142] A First step.

Q What was the second step?

A Second step is, in this particular instance, jumped by the union to go to the third step.

Q What would have been – well, why was there a jump, if you know?

A In a case involving, as in Norris's – Mr. Norris's case, a termination allegation, the –

Q You mean a termination decision?

A Well, a position by the union the employee has been terminated from his employment or is entering the process to effect his removal from the employment relationship with the employer. Under our labor agreement they have the right to bypass the second step and go directly to the third step.

Q Okay. I think you indicated – in describing the third step, you stated that there would be a third step hearing officer, and you basically set forth the procedure whereby the company would have a chance to present its position and the employee, through the union, I take it, would have a chance to present his or her position?

A That's correct.

Q The meeting would be presided over by Mr. Ogden?

[p. 143] A That's correct.

Q Your letter, if I understand it correctly – and please correct me if I'm wrong. Your letter to Mr. Poomaihealani was basically saying that Mr. Ogden's letter had negated the necessity of a third step because the hearings officer had already offered reinstatement to the employee?

A As a termination hearing, certainly. I think that – that it would be appropriate to keep in mind what I've indicated earlier, is that Mr. Poomaihealani, to my recollection – as we do in most cases involving the initiation of a procedure that could lead to an eventual permanent loss of a person's position, the union's general goal and – from my perspective is to try to get the person back to

work. And that is – that is what the union really was requesting: Can we get this guy back to work as quick as we can.

And the action which was taken by Mr. Ogden was not a third step decision. It was an action taken by virtue of his authority as the vice president to mitigate the action taken by Mr. Matsuzaki to a suspension. So from that perspective, we no longer had a discharge case that we were dealing with in the grievance process.

Q As far as –

A And under – I'm sorry.

[p. 144] Q No, I'm sorry.

A Under our – okay. Under our process the individual still has the right under our labor agreement to proceed in any fashion that he deems appropriate through his union or through his union representative: proceeding ahead, or pushing forward from Mr. Ogden's decision if the grievant or the union were unwilling to accept that and wanted to push it forward, or to grieve the decision of Mr. Ogden. They have all kinds of make – whole remedies within the grievance process itself, which include restoration of seniority, restoration of employment, back pay. Practically anything you can think of, really.

Q All right. Now, what would have been – let's assume for the moment that Mr. Ogden had sustained Mr. Matsuzaki's action at the third step. What would be the next step by which the grievant would proceed?

A Well, it would be to provide the company with notification that the action taken by the third step hearing

officer in the third step hearing was unacceptable and that they wished to proceed to arbitration, and an arbitrator would be selected and we would then proceed through the arbitration process.

Q What is involved in the arbitration process?

A Well, selection of a neutral.

[p. 145] Q By whom?

A By the union and management.

Q Does the union and management get – do the union and management get together and select one person, or do they each select a person who selects a third – who together select a third person?

A There are any number of options available on the selection of a neutral. In the circumstances we have, generally the union makes a request for one arbitrator, and unless for some reason that is unacceptable to the company, we generally abide by the union's request on who they want to serve as an arbitrator.

In the event we were unable to reach a satisfactory agreement, there are any number of ways in which that issue can be resolved. If – if the company – the union were to proffer somebody that was unacceptable and management were to proffer somebody unacceptable to the union, then there are numerous ways in which both individuals who have proffered could sit together and select a third. It is strictly an issue that is left to the discretion of the parties, on selection of the independent neutral. We have never had a problem with – between the union and management selecting a neutral since I've been with the company.

[p. 146] Q Arbitration involves what?

A You mean the nuts and bolts of an arbitration?

Q I'm just trying to get an idea of how the system – the process that you've repeatedly described here today, how it works.

A Mm-hm.

Q We've now gone through the hypothetical situation. We've passed the third step. Mr. Ogden has sustained Mr. Matsuzaki's decision terminating Mr. Norris. I'd like to find out what is involved in the arbitration.

A Generally speaking, the union would prepare a position paper involving the issues, setting out the issues as they perceive them to be, setting out the position of the union on those issues, setting out the position of the company as they understand it to be on those issues, and including their prayer for relief to the arbitrator.

Q Does the company prepare a similar position paper?

A It has the right to prepare a similar position paper. If it has no – no challenge to the issue as presented by the union or to any of the – the facts as presented by the union, it may elect to just proceed on that basis. Or it may submit at any time its own [p. 147] position of – on the issue to be decided by the neutral.

And – and then, of course, there is an arbitration hearing in which the contract provides there may be a court reporter present. The witnesses are sworn and the

cases of the respective sides are presented. And the arbitrator acts with essentially unfettered discretion in determining what kind of remedy is available. He has the full ambit of remedies available to him: restoration for duty, full back pay, supporting the company's position, modifying that action in some way that he deems appropriate.

Q I see. So let's discuss that. Let's get into the remedies. The remedies available to the arbitrator for use in a particular instance would run from sustaining the action of the company and management personnel – which would be one possibility, correct?

A Yes.

Q It could go back – it could reinstate the grievant with or without back pay?

A That's correct.

Q It could restore any loss of privileges that had been occasioned by the discharge?

A That's correct.

Q When you say "unfettered discretion," you mean that literally, I take it?

[p. 148] A Other – you know, within the terms of contractual agreement between the parties. He's guided by the contract.

Q The contract does not provide for anything in terms of remedies apart from, say, reinstatement with back pay and no loss of rights and privileges?

A I'm not sure I understand your question, I'm sorry.

Mr. Hipp: I'll object to that. The contract will speak for itself as to what it provides.

Q (By Mr. Boyle) Is that a fair statement?

A I'm sorry. You'll have to repeat your – what Ken is saying or what you've – you'd have to repeat your question.

Q No, I'm just asking you: Is that a fair statement, that the contract –

A That the contract speaks for itself?

Q No, not that – I recognize contracts speak for themselves. That's why thousands and thousands of lawyers have graduated each year: to interpret them.

But in any event, are all of the remedies for the grievant spelled out in the contract between the airline and – Hawaiian and the Iam [sic]?

A No, I don't believe they are, not all the remedies.

[p. 149] Q Well, I'm talking about – well, when you say "unfettered discretion," I'm just trying to get an idea of what the arbitrator can do for the grievant if the arbitrator determines that the company was in the wrong and that the company should not have, for example, discharged the employee.

A The arbitrator has the right to restore the employee to duty with full back pay, he has the right to restore any seniority that the individual may have lost as a result of the company's actions, essentially has a right to order the records expunged from the file, to name a few. Those were probably the principal actions that an

arbitrator would commonly consider or have available to him in the event he felt the action of the company was not sustainable.

Q For the employee that is reinstated with full back pay, what sort of protection is afforded the individual from the retaliation of supervisors?

A That's assuming that there would be some potential for retaliation. I'm not - I'm not quite sure I understand what you're – what you're asking me. An individual has the right to be secure from retaliation by any individual as a result of being restored to duty based upon an arbitrator's decision.

Q Well, I guess – you know, there's no secret to [p. 150] where we're going. You've been with the company 5 years. Have you ever seen a situation where an employee was restored to his or her position pursuant to this process that you've described –

A Sure.

Q – and a supervisor attempted to visit some sort of retaliation on that employee?

A I've not seen that happen, sir.

Q You have not seen that?

A I have not seen that happen. I can candidly state that the advice that the company – from the Ird [sic] and the personnel department's posture is, and time there is a restoration to duty, whether it be by mitigation or by arbiter's decision, that the department is advised that that is a decision of an independent arbiter and is to be accepted in good grace by all employees affected.

Q Did you ever hear any – strike that.

I'd like to show you a document that's been marked in – already been marked in other depositions, but I'd like to have it marked here and I'd like to ask you to take a look at it. First let her mark it and then I'd like you to review it.

A Okay.

Q It's the change of status form that I'm certain you're aware of.

[p. 151] A Mm-hm.

(Ms. Mollway entered the deposition.)

(Exhibit 5 was marked for identification.)

A Very well.

Q You've seen that before?

A Yes, sir, I sure have. Well, I've seen this form. Whether or not I've seen this exact one I'm not sure, but –

Q Okay. Well, I'd like to direct your attention to halfway through the middle of the page. It says, "Employment re-instated per Mr. Steve Thompkins Office." That confused me. Do you know what they're referring to there?

A I – I really don't know who prepared this particular document. Generally speaking, any time – this is what we call a Hal 76, and it's a notification of change form. Any time there's any action resulting in an adjustment of an employee's status with the company, there is a Hal 76 form, which is an administrative form, which – using a

term you said you don't like, which really memorializes what has happened with the individual.

And this document then is used as a basis for the – the computer input on the salary, as the document [p. 152] for recording in the personnel file as to what has happened with that particular individual. It's not an action document as such. It's a – it's an administrative fill-in-the-blank type thing.

Now, what – if – if the personnel office was aware of an action being taken pertaining to an employee that required a Hal 76, this particular document, then they ordinarily would call out to the department, saying, "You know, I understand such-and-such has happened with an employee. We haven't yet received your Hal 76. You need to get it in so that we can put it in the file."

Q Well, the only thing that I'm curious about is that as I understand it from your testimony, Mr. Norris's employment was reinstated per Mr. Ogden's letter.

A That's correct. That's the action document.

Q And I understand this document wasn't prepared by you, but this document states, "Employment re-instated per Mr. Steve Thompkins Office."

A Okay. Mr. Ogden's letter is the action letter, sir. This document – again, under my purview within my departments includes all the personnel area. And the clerks in my department, having seen a letter such as the action letter of Mr. Ogden pertaining to Grant Norris, would oftentimes call to the secretaries of those departments involved and say, "I don't know if you've [p. 153] seen it or not, but, you know, in this case Grant Norris

* * *

[p. 218] Q Do you know what his background is in airlines?

A I do not know.

Q Do you know what his background is, period?

A I do know that he has extensive travel industry experience. However, I can't specifically speak to –

Q Airline background?

A His airline background, yes.

Q Okay. What about Mr. Talbot? Does Mr. Talbot maintain a permanent residence here?

A Yes, he does.

Q The next document we looked at was Exhibit 9. What was the genesis of Exhibit 9?

A Exhibit 9 is a settlement agreement involving the Federal Aviation Authority and Hawaiian Airlines.

Q Yes, I know what it is. I was asking you what the genesis was. I understand, for example –

A Okay.

Q – that you – do you know what "genesis" is?

A Yes, I do.

Q Okay. Can you tell me what the genesis is of that document.

A The fact that there were certain disagreements between the Federal Aviation Authority and Hawaiian Airlines which had been outstanding. And in discussions,

mutual discussions between the Federal Aviation Authority [p. 219] and Hawaiian Airlines, a settlement agreement was reached resolving those issues.

Q Okay. When did the discussions begin?

A In spring of 1990.

Q What was involved in the discussions?

A I don't know specifically. I can say that I do know they involved Mr. Talbot of Hawaiian Airlines. And who – who all at the Federal Aviation Authority was involved I can't honestly say, but I do believe a fellow by the name of Mr. Merriman.

Q All right. It was my understanding – and I'll make a representation to you. Mr. Talbot indicated during the course of his deposition or earlier session of his deposition that he met with Adm. Busey in Washington. I don't have his transcript with me, and I just want to ask you: Were you involved in that meeting?

A No, sir, I was not.

Q Do you know if such a meeting took place?

A I do not know.

Q But in any event, in the spring of 1990 settlement negotiations commenced between the FAA and Hawaiian Airlines?

A There were discussions held between the FAA and Hawaiian Airlines pertaining to cases and concerns or disagreements which existed between the two which led [p. 220] ultimately to that which is marked as Exhibit 9.

Q All right. First of all, when in the spring of 1990? were these discussions?

A Sir, I'm – I would have to give my best guess, and I know I'm not supposed to guess, but it would have had to have been February or March. Probably the February time frame. I was not involved in those initial discussions.

Q Who was involved in the initial discussions? Mr. Talbot?

A To my knowledge, the subject was – was originally discussed by Mr. Talbot with individuals with the FAA.

Q Do you know who Mr. Talbot discussed these matters with?

A You've indicated to me, sir, that he had discussions with Adm. Busey. I was not aware of that.

Q I'm the first person who told you that Mr. Talbot met with Adm. Busey? The record should indicate in this particular deposition that Adm. Busey is the head of the FAA.

A That's correct.

Q Correct?

A Essentially.

Q You did not know before I told you that Mr.

* * *

[p. 291] MR. HIPP: I'm going to object to that to the extent that it requires any disclosure of attorney-client privileged information.

A I can't honestly say I know –

MR. BOYLE: Hint, hint.

A I can't honestly say I know all the reasons why Mr. Culahara had moved from one work location to another. I do know that there was a vacancy, I believe, in the maintenance control function which required a senior, experienced maintenance individual to fill and that Mr. Culahara was selected to fill that position.

Q (By Mr. Boyle) Well, was his change – or the fact that he was no longer supervising maintenance operations, was that a disciplinary measure that was taken against him by the company, or was that simply a matter of a change in positions that had no relationship to any of the allegations against him?

MR. HIPP: I'll object to that as assuming false alternatives.

A To my knowledge, there was no disciplinary action instituted involving Mr. Culahara. Above and beyond that I can't answer the question without violating the attorney-client privilege.

Q (By Mr. Boyle) Okay. But you know the facts – you know at least the allegations made in Mr. Norris's [p. 292] complaint, do you not?

A Yes, sir, I do.

Q Did the company ever take any disciplinary actions against anyone other than Mr. Norris?

A "Ever"? You know, sir, that's a very broad question.

Q Oh, come on. Let's not be cute, Counsel.

A No, I'm not trying to be cute.

Q Arising out of the July 15th incident. I mean, there was an incident on July 15, 1987, wasn't there, Mr. Thompkins?

A Sir, you've asked me to be specific in my responses to your question. Now, your question was totally open-ended. I'm not trying to be cute.

Q – to be cute, we can get through this a little bit quicker.

A I am suggesting that –

Q Are you about to break down again?

A No, I – I beg your pardon.

Q Do you want to take a short break?

MR. HIPP: I'm going to object to this. He's harassing the witness once again, as he's done throughout this deposition and previous depositions.

A My question – my response to your question was, your question was very broad. And I ask you [p. 293] essentially –

Q (By Mr. Boyle) All right. I'll withdraw it.

A – to be definitive on what your question –

Q Just calm down.

A was, as you invited –

Q Calm down.

A – me to do, sir.

Q Please calm down.

A As you invited me, to do, sir, at the beginning of these depositions –

Q Please calm down.

MR. HIPP: Would you please calm down, Mr. Boyle. You're the one who's out of control.

MR. BOYLE: There's no need to raise your voice, Mr. Hipp.

MR. HIPP: You're the one out of control. You're the one raising your voice.

THE WITNESS: No one is raising a voice.

Q (By Mr. Boyle) Do you want to take a short break while you compose yourself, Mr. Thompkins?

A I'm perfectly composed, sir –

Q All right. Well, then –

A – but I would like to request that you rephrase your question to be specific so I can answer it.

Q That's what you're supposed to do. If you [p. 294] don't understand the question or you find something wrong with the question, I'll rephrase it.

A All right. Please do.

Q There was an incident on July 15th, on the morning of July 15th, 1987, right?

A Yes, sir.

Q Was anyone disciplined because of this incident?

MR. HIPP: I'm going to object to that as assuming a legal conclusion since Mr. Norris dropped out of the grievance arbitration proceeding.

A There was an action instituted against Mr. Grant Norris as a result of that, sir.

Q (By Mr. Boyle) Was he disciplined?

A There was an action instituted against Mr. Norris, yes, sir.

Q You know, I'm asking the questions. If the answer to my question is "no," you can tell me that the answer to my question is "no." If the answer to my question is "yes, but," "yes" with qualifications, or "yes, may I explain," please feel free to do that.

A All right. Yes. May I explain.

MR. HIPP: Or –

MR. BOYLE: Okay. First of all, may I ask Joan what my question was and what your answer was.

[p. 295] (The record was read by the reporter, as follows:

Q Was he disciplined?

A There was an action instituted against Mr. Norris, yes, sir.)

Q (By Mr. Boyle) Was Mr. Norris disciplined?

A Sir, there was – there was a disciplinary action initiated. Mr. Norris did not proceed through the entire procedure.

I think, as I've previously testified, that at Hawaiian Airlines, under the contractual agreement between the parties, the preliminary action procedure is a 3- to 4-pronged system whereby an action is initiated but is not really a final action until all those steps are concluded.

In the case of Mr. Norris, there was an action instituted, and at a point in time the termination action which was instituted was reduced by Mr. Ogden to a suspension without pay for a period of time and was not pursued by Mr. Norris after that point in time.

So yes, there was an action initiated, sir.

Q All right. Was holding Mr. Norris out of service a disciplinary action?

A No, sir.

Q Was holding Mr. Norris out of service without [p. 296] pay a disciplinary action?

A No, sir.

Q Mr. Matsuzaki sent a letter to Mr. Norris in which he said, "You are discharged." Can you tell me whether or not, just in layman's terms – laymen are going to hear some of this testimony and I want to hear it – you're an attorney and I want to hear it from you. Mr. Matsuzaki's letter in which he said, "You are hereby terminated," was that a disciplinary action by Hawaiian Airlines?

MR. HIPP: I will object to that as calling for a legal conclusion. It is not a layman's term or a layman's issue.

MR. BOYLE: Counsel, I disagree with you 100 percent on that. The fact of the matter is that ultimately a jury not composed of 12 members of the Outrigger Canoe Club or 12 members of the Oahu Country Club is going to have to decide this issue.

Now, I look at documents and I see "You are hereby discharged" and I look at other documents that say "You are hereby held out of service without pay," and to an ordinary person who doesn't have the vast labor background that you have, Counsel, that would appear to be a disciplinary action.

Now, I'm just asking Mr. Thompkins whether

* * *

[p. 299] Q (By Mr. Boyle) Yes. In your dictionary.

A There might be instances in which they might be.

Q In this particular incident you used the term "punishment." Were you also talking about discipline?

A Yes, sir.

Q As I understand it, the company never disciplined or punished anyone other than Grant Norris for the incident that occurred on July 15th, 1987. Is that accurate?

MR. HIPP: I'm going to object to that as assuming facts not in evidence, namely that Mr. Norris was punished or disciplined as a result of the July 15th incident.

A I have no recollection of any other actions being initiated –

Q (By Mr. Boyle) Well –

A – as a result of the –

Q – Mr. Hipp raises this problem. I'm going to move off. I'll move away. I'll get away from this. But your sentence here –

A Mm-hm.

Q And I guess we're all lawyers, but regardless of what we think of one another, the fact of the matter is that you seem to assume here in this sentence that [p. 300] there was discipline imposed or punishment imposed on Mr. Norris. Is that a fair reading of that sentence?

A No, sir, I don't think so. I think you have to –

Q Why not? Because – the reason I ask that is, if you take a look at the sentence, you say "some punishment other than termination."

MR. HIPP: It says "if it is appropriate."

MR. BOYLE: Yes. Right. "If it is appropriate to impose some punishment other than termination."

Q (By Mr. Boyle) As of that date he had been terminated, hadn't he?

A No, he had not. The process was placed – initiated to effect a termination, but there was a grievance process actually under way. And as I've tried to explain, the grievance process – the culmination of the grievance process is the point at which time an action initiated is finalized.

So yes, sir, there was an action initiated to effect this employee's release from employment. However, it had not been finally concluded. The grievance procedures articulated and set out in the union contract had not been completed.

And the language, sir, in this paragraph has really three alternatives. If it is appropriate to [p. 301] impose some punishment against Mr. Norris other than termination if any punishment at all was going to be appropriate or any discipline at all. You know, there was a full ambit of alternatives here.

Q Well, I – you know –

MR. HIPP: I'm going to let the record reflect that Mr. Boyle continues to interrupt the witness. He was not finished.

Q (By Mr. Boyle) Am I interrupting you?

MR. HIPP: He said there were three alternatives.

Q (By Mr. Boyle) What are the three alternatives?

A Essentially in this case it would have been proceeding on and sustaining the initial action to impose a termination; some alternative discipline short of termination; or determining that no action, no disciplinary action or punishment, if you will, of any type was appropriate in this case.

Q Are you finished?

A Yes, sir.

Q Okay. Where was that stated in any communication to Grant Norris?

MR. HIPP: I'm going to object to that. It assumes facts not in evidence –

[p. 302] MR. BOYLE: It sure does.

MR. HIPP: – that Mr. Thompkins knows all the communications to Grant Norris.

A Certainly Mr. Norris, as any new employee is, is provided a full copy of the labor agreement in existence between the parties, and that when you're asking about communications, I guess that's a written document. As far as written communications to him, I have no idea what his labor union may have provided to him because obviously they were representing him at that point in time, sir.

Q (By Mr. Boyle) Okay. The communication, though, from Hawaiian Airlines said he was terminated, right?

A That's – I believe that's correct.

Q It didn't say anything about a 3-part process, did it?

MR. HIPP: There are multiple communications here. I'm going to object to that as assuming facts not in evidence, namely that there was one communication.

A Question?

MR. HIPP: Do you have a question?

Q (By Mr. Boyle) Yes, I do have a question.

A Okay, sir.

Q Do you have the answer?

[p. 303] MR. HIPP: What is the question?

Q (By Mr. Boyle) Mr. Thompkins, was there any communication from Hawaiian Airlines that discussed this 3-part process that you were talking about?

A The labor agreement in existence between the parties which – of which Mr. Norris has a copy specifies the grievance procedure in existence. And of course we – Mr. Norris at that time was represented by the union.

Q I'm talking about correspondence from Hawaiian Airlines. I believe we talked at some length about – Perhaps we didn't – Mr. Matsuzaki's letter. You're familiar with Mr. Matsuzaki's letter, aren't you?

A I don't know it word for word, certainly, but I'm familiar with the letter.

Q I'll represent to you that there's nothing in there about – Mr. Matsuzaki's memo, actually, it looks more like.

A Okay.

Q There's nothing in there about this 3-part process.

A All right.

Q My simple question to you is: Do you know of any letters that were sent which set forth this 3-part process?

A Not letters. The contract, however, does set

* * *

[p. 308] evidence.

Q (By Mr. Boyle) All right. Let me withdraw that question.

Let me put it this way: Did you evaluate each one of these cases concerning maintenance or operations of Hawaiian Airlines prior to your meeting with Messrs. Lawson, Williams, and Merriman in order to discuss these matters?

A I reviewed each case file to determine what the initial letter from the FAA had set out as the maximum civil penalty which they might be seeking and whether or not there were any offers of compromise made by the FAA prior to my meetings with – with them; and also attempted to determine, as best as I could accurately do so, specific cases that the FAA may have initiated which may or may not have ever been served upon Hawaiian Airlines for any number of reasons.

And because the numbers were not consistent, the discussions formulated on those cases which – the numbers which we were sure were outstanding or felt confident were outstanding and included any and all other cases whether or not there was actually a letter or a case file number assigned to them.

Q Did you evaluate these cases prior to your meeting with the FAA?

[p. 309] A Not all of the cases on – pertaining to the merits of the case, sir?

Q Yes, sir.

A No, sir.

Q Any reason why you did not?

A In some cases there were not complete case files available.

Q Did you feel – I take it you did not feel it would be a good idea to evaluate how much these cases might potentially be worth if the FAA filed actions in the United States District Court for the District of Hawaii?

MR. HIPP: I'm going to object to this as it calls for speculation.

A I reviewed the cases from the perspective of what – as I've indicated, from what was in the initial letter from the Federal Aviation Administration as far as their proposed civil penalty to determine what the maximum potential liability would be in the event the claims were ever to be resolved adversely to Hawaiian Airlines. However, in many of the cases our opinion was that the cases, if they proceeded, would be resolved favorably to Hawaiian Airlines.

Q (By Mr. Boyle) Okay. But in order to determine whether or not they'd be favorably resolved, [p. 310] that is, resolved favorably to Hawaiian Airlines, did you not look at the facts and circumstances or the basis of each one of these claims?

A Only those in which I could locate the claim files.

Q You've said that repeatedly this morning and this afternoon. How many claim files could you not locate?

A I don't recall specifically, Mr. Boyle. There were a few that could not be located.

Q Well, there are – there's a list here on Exhibit 9. Can you tell me by looking at the list which files you could not locate.

A The files I could not locate generally pertained to numbers not listed here.

Q All right. But of these files – okay. All right. Even though this document, that is to say, Exhibit 9, lists a series of cases, the document itself covers more than that list?

A That's correct.

Q The documents you did not – strike that.

And the files that you did not evaluate are not listed here?

A The files I did not evaluate are not listed here?

[p. 311] Q Right.

MR. HIPP: I'll object to that as vague and ambiguous.

A There were other files which I did evaluate which are not specifically listed here but which are settled by the agreement.

Q (By Mr. Boyle) How many?

A Hmm. I would have to guess. 5 or 6.

Q Did you evaluate the axle sleeve file?

A In that particular instance there was initial request of the FAA, I think as I've indicated, for initial civil penalty in excess of 900,000. Then there was an offer by the Federal Aviation Administration – or a reduction of that to something other than 300,000. The file was substantially discounted at that point in time, and my perception was, it was an acknowledgement of the weakness of that case.

Q What? To discount it from 958,000 to three hundred or –

A Whatever it was.

Q Whatever that figure was?

A Yes.

Q What do you evaluate the file to be worth?

A I felt that we had significant defenses to that case which would have led to Hawaiian prevailing in the [p. 312] action.

Q Okay. Can you tell me what – you finally reached an agreement for the total payment to the FAA of some $360,000, right?

A Mm-hm.

Q You have to answer out loud.

A Yes, that's correct. I'm sorry.

Q All right. Can you tell me what that was for.

A Essentially any and all cases either initiated or potentially being initiated by the FAA pertaining to any

and all matters pertaining to the operations of Hawaiian Airlines occurring on or before April 13th, 1990.

Q I understand that, but please tell me, for example: What value did you give 85WP130102?

A I don't recall.

Q If I asked you the same question with respect to the rest of those numbers, would you recall?

A No, I would not.

Q Where did you get the number of $360,000?

A Well, essentially it was a negotiated figure, looking at the maximum exposure on all the cases without regard, necessarily, to the merits.

Q What do you mean "without" – how can you talk about – I'm not trying to argue with you, but how can [p. 313] you talk about exposure of the case without regard to the merits?

A Essentially the –

Q I usually figure –

A Okay. I've indicated that the – that we look at the case or I looked at the cases from the perspective of what the FAA had originally requested as a suggested maximum civil penalty which could be imposed. And I know that amount was in excess of $1 million.

And then I evaluated the cases from the perspective of what the cost of litigation may well be, the time involved for counsel inside the company and outside the company, and came up to a conclusion as to an appropriate settlement range which we would consider to resolve

any and all actions up through that point in time; considering also the desire of the company under – subsequent to the tender offer to be working on a clean slate and the desire of the FAA to get all of these cases behind them.

Q What was the – what was your range of settlement figures prior to your 13th of April 1990 meeting?

A I would – don't specifically recall, but the – the upper range of which I would have considered settlement as being reasonable without having further [p. 314] discussion was a little over $400,000.

Q What was said at the meeting on April 13th, 1990?

A I don't recall everything in detail. I know that –

Q Did you keep any notes? Most lawyers do.

A I did keep notes on that day, yes, sir.

Q Where are those notes presently?

A Those have been discarded after the final settlement was agreed to and the settlement agreement was drafted and signed. Those were undoubtedly discarded and the case files were retired.

Q Did you do anything – including the axle sleeve file?

A The axle sleeve file, I don't recall having anything other than a skeletal file on the axle sleeve.

Q Why did you have a skeletal file on that? Was that a reflection of the exposure to the company of that particular file?

A No, sir, I don't believe. I think the – the files were essentially –

MR. HIPP: Can we take a 1-minute break.

MR. BOYLE: Let the record indicate that it was Mr. Hipp who asked for the break.

MS. MOLLWAY: And also that I came in and gave [p. 315] him a letter.

MR. BOYLE: "And let the record also indicate" – Jesus.

(Recess: 2:03 p.m. to 2:09 p.m.)

MR. BOYLE: Can you read back the last couple of questions and answers.

(The record was read by the reporter.)

Q (By Mr. Boyle) All right. Basically, Mr. Thompkins, my question was: The fact that your file with respect to the axle sleeve matter was skeletal, was that fact a reflection of your belief that the matter had no merit?

MR. HIPP: I'll object to that. Vague, ambiguous, calls for speculation.

A No.

Q (By Mr. Boyle) What was it a reflection of, if anything?

A The fact that that matter was being handled by Washington counsel and that the files were maintained in Washington, DC, and I simply only had a skeletal file.

Q Was that also one of the reasons why you called Washington counsel?

A That's correct.

Q Now, you sat down with these individuals in LA, and I think you've indicated you don't recall everything [p. 316] that was said. I want you to tell me what you do recall was said. First of all, how long did the meeting last? I always forget that question.

A Probably 3 or 4 hours.

Q Morning or afternoon?

A Morning.

Q Weekday?

A Yes.

Q What day, do you recall?

A No, I don't recall.

Q What occurred? What was said?

A Essentially, we introduced each other, and we talked in terms of the fact that Hawaiian Airlines had been the subject of a successful tender offer at the end of December of 1989 and that I – I indicated my understanding that our president, Mr. Talbot, had had discussions with Mr. Merriman in which the prospects of resolving any and all outstanding issues that might exist between the Federal Aviation Authority and Hawaiian Airlines was a subject of discussion and that I was pleased to have an opportunity to meet them and sit down and attempt to explore the possibility of setting all those things behind us and proceeding with essentially a new slate.

I pointed out that I had attempted to generate [p. 317] a list of matters which I believed then might be outstanding involving the Federal Aviation Administration and Hawaiian Airlines and that I had significant concern as to whether or not my listing was consistent with what they had in their files and whether or not there were other cases which their records might reflect had been initiated and perhaps withdrawn; or initiated, not processed; or initiated and processed which I might not have records.

We went through their listing of what they had together with questions on some listings that I understood might have existed in Washington for which I could find no files. There were some files that none of us could determine what had existed.

We went through the procedures on how, at least my understanding – or what – they gave me a very brief overview of how they assigned case numbers and who – which division does it, the – initially there might be a matter that's assigned a case number. It's referred by the operations division, as I understood it, to their counsel, and the counsel may or may not ever send a letter on.

So there was – there were some significant questions as to the numbers of cases and whether or not they were active cases or perhaps past settled cases or [p. 318] cases that were never served.

And we – we discussed ways to approach and attempt to put all these issues behind us and Hawaiian's position that essentially the cases were without merit, but we were interested in talking with them from the perspective of maintaining an open, full dialogue with the

FAA, and – in an attempt to exercise some economy and save all of us time, effort, and expense in litigating any cases which might be brought under the old FAA procedures, which would have to be brought through the United States Attorney, if at all, and defended in federal district court if the U.S. Attorney decided that the FAA cases were worthy of presentation, and the cost of defending that by the U.S. – or prosecuting those cases by the U.S. government in the event they chose to prosecute and the cost to Hawaiian of defending cases.

And finally a mutual agreement was reached as to the fact that it was desirable to settle all those cases which were then pending as of – on or before April 13th, whether or not they had been assigned case numbers or whether or not there had been an action initiated, and we then discussed settlement amounts and agreed tentatively on a figure, and then we discussed a payment schedule.

Generally then we discussed the positive

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EXHIBIT 1

TO: Howard Ogden
FROM: Steve Thompkins
SUBJECT: Termination of Employment
Grant Norris
DATE: August 17, 1987

Reference is made to our previous discussions concerning this matter. I want to emphasize that as Mr. Norris was in fact terminated on August 3, 1987. It is very important that immediate attention be given to the issue of whether or not we wish to sustain the action of Mr. Matsuzaki in terminating his employee or whether or not a return to employment is appropriate.

If it is appropriate to impose some punishment against Mr. Norris other than termination, such action should be taken promptly to avoid the problems which are created by a back pay award either at the 3rd step of the grievance procedure or by an arbitrator. Obviously none of us want to see an employee given an extended vacation with pay if that is not appropriate.

I am aware that other problems exist pertaining to this case, however I would suggest that we review the case file and if it appears that some disciplinary action other than termination is appropriate that you take prompt action to modify Mr. Matsuzaki's order (for example from a termination of employment to a suspension without pay for a period of time) and get this gentleman back to work.

Please advise at your earliest convenience.

/s/ Stephen Thompkins

SRT:cud

EXHIBIT 4

(Logo)
HAWAIIAN

AIRLINES

September 14, 1987

Mr. Samson Po'omaihealani
IAMAW District Lodge 141
1449 South Beretania Street
Honolulu, Hawaii 96814

Re: 3rd Step Grievance Hearings
Enos, Palmer and Otoguru

Dear Sam:

This is to follow up on your conversation today with Mary Ellen Sorensen pertaining to subject grievance hearings.

First, please be advised that Grant Norris has been reinstated, which negates the need for a hearing at the third step. Second, October 5, 1987 is agreeable to me for scheduling the third step hearings for Gordon Palmer, Steven Otoguru and Fred Enos. It is my understanding that the Palmer/Otoguru grievances will be heard at 10:00 am with the Enos hearing to follow (at approximately 11:00 am).

In the event HAL does not have a new Director of Industrial Relations on board, we may want to request a delay as none of these cases involves a discharge.

In any case, all hearings will take place in the HAL conference room at 1164 Bishop Street, Suite 800. Your kokua is appreciated.

Sincerely,

/s/ S.R. Thompkins
Stephen R. Thompkins
Vice President-Administration
and Counsel

cc: D. Glover
B. Perry
G. Fleming

HAL 70 - REV. 1/84

HAWAIIAN AIR — NOTIFICATION OF CHANGE

SECTION I

R = REINSTATEMENT
N = NEW HIRE
C = CHANGE DATA OR TRANSFER
T = TERMINATION OR LEAVE

R ← TYPE OF ACTION:

EFFECTIVE DATE OF NOTIFICATION: Sept. / 15 / 1987

Name (LAST - FIRST - MIDDLE)	EMP. NO.	LOCATION	LOC. CODE	DATE PREPARED
NORRIS, GRANT TIMOTHY	4063	LINE MAINTENANCE	532	9 / 15 / 87

SECTION II

	OLD HOURLY RATE OR OLD MONTHLY SALARY	NEW HOURLY RATE OR NEW MONTHLY SALARY
RATE		$10,51 +

	OLD JOB CLASSIFICATION	P.T. or F.T.	JOB CODE	NEW JOB CLASSIFICATION	P.T. or F.T.	JOB CODE
CLASSIF.				A/C Mechanic	F.T.	M1

FORM INSTRUCTIONS AND CODES ON BACK

	LAST NAME	FIRST, MIDDLE
NAME	NORRIS	GRANT T.

PLEASE TYPE OR PRINT ALL INFORMATION

	STREET ADDRESS
STREET ADDRESS	1125 A 2nd Avenue, Apt. 4

	CITY	STATE	ZIP
CITY STATE	Honolulu	HI	96816

MARKED OFF SPACES INDICATE MAXIMUM NUMBER OF CHARACTERS ALLOWED IN EACH BOX

	SOCIAL SEC. #	BIRTHDAY	SEX	S or M Mar. Status
PERSONAL DATA	561-92-2147	12 / 16 / 53	M	S

LETTER AND/OR NUMBER NEED NOT BE PLACED WITHIN MARKED OFF SPACES

SECTION III

	FROM: LOCATION	LOC. CODE	TO LOCATION	LOC. CODE
TRANSFER				

SECTION IV

CODE	RETURN DATE	TOTAL DAYS OFF	LAST DAY WORKED
	/ /		

QUALITY	Quantity	ADAP	Job Know	DEPEND	ATTITUDE

Code: "O" – Outstanding; "G" – Good; "F" – Fair; "A" – Acceptable; "P" – Poor.

Would you Rehire? Yes ☐ No ☐

Resigned ☐ Laid Off ☐ Discharged ☐ Other ☐

LEAVE OF ABSENCE OR TERMINATION

REMARKS: Employment re-instated per Mr. Steve Thompkins Office.

Give Reasons for all actions

SECTION V

PERSONNEL WILL COMPLETE THIS SECTION

RECEIVED SEP 16 1987 HAWAIIAN AIRLINES PRESIDENT'S OFFICE

HAWAIIAN AIRLINES, Inc.

SEP 1987

FED #	STATE #	FED ADDIT	STATE ADDIT.		LIC. CODE	UNION CODE	BASE%	ADD%
WITHHOLDING INFORMATION							FLT. A - RET.	

ADMINISTRATION DEPT.

HOURS	MOS.	LONGEVITY		VAC	S/L	S/L RES.
PART TIME STATUS		DATE		REINSTATEMENT		FLT. ATT.

SECTION VI

APPROVALS: (Approval space on right required only in case of transfers)

DATE	ORIGINATING ORGANIZATION		RECEIVING ORGANIZATION	DATE
	H. HONMA	IMMED. SUPVR.		
9/15/87	H. E. OGDEN	DIVISION HEAD		
	P. J. BINKLEY	DEPT. HEAD		
		IRD.		

PERSONNEL

290

291

BEST AVAILABLE COPY

EXHIBIT 5

EXHIBIT 9

UNITED STATES OF AMERICA

FEDERAL AVIATION AUTHORITY

In the matter of

Hawaiian Airlines, Inc. ("HAL")
FAA Case Nos.

85WP130102	88WP130142
88WP130009	89WP130077
88WP130028	89WP130095
88WP130046-47	89WP710043
	90WP130010

And all other matters which might give rise to possible FAA cases concerning maintenance or operations of HAL on or prior to April 13, 1990 (excluding security cases).

SETTLEMENT AGREEMENT

This Agreement entered into this 30th day of May, 1990, is between Hawaiian Airlines, Inc. ("HAL") and the Federal Aviation Authority, a United States governmental agency. This agreement constitutes a full, final and complete settlement of all the above-referenced FAA cases pending against HAL as well as a final settlement of all potential FAA cases against HAL arising out of any matter occurring on or before April 13, 1990 (other than security matters).

The terms of the Agreement are as follows:

1. The FAA agrees to formally close with prejudice each of the above-referenced cases without making any findings of fact or conclusions of law.

2. The FAA's formal closure, with prejudice, of each of the above-referenced cases shall take place as of the date first written above.

3. The FAA agrees that this Agreement covers all matters arising out of or relating to the maintenance or operations of HAL (other than as to security) through 11:59 p.m. on April 13, 1990. Therefore, the FAA agrees not to open or pursue any case or investigation against HAL for any violation of Federal Aviation Regulations occurring on or prior to April 13, 1990. This Agreement does not include settlement of actions – if any exist – against individual employees in their individual capacities.

4. In return for the promises of the FAA contained in this Agreement, HAL promises to pay the FAA the sum of $360,000 as follows: $120,000 will be paid on May 28, 1990; $120,000 will be paid on the first Tuesday following September 1, 1990; and $120,000 will be paid on the first Tuesday following January 1, 1991. All parties agree that by making the foregoing payments neither HAL nor its owners, directors, officers, managers, supervisors, or employees are admitting to any fault or any violation of the Federal Aviation Regulations or any other law whatsoever. HAL is entering into this Agreement to avoid the costs of litigation in the above-referenced cases and in order to foster good relations between the FAA and HAL's owners, directors, officers, managers, supervisors, and employees.

Understood and agreed to as of the date first written above.

FEDERAL AVIATION AUTHORITY

By /s/ DeWitter T. Lawson, Jr.
Its Asst. Chief Counsel – Western-Pacific Region

HAWAIIAN AIRLINES, INC.

By Stephen Roy Thompkins
Its Vice President, Administration Counsel and Secretary

[p. 1] IN THE CIRCUIT COURT OF
THE FIRST CIRCUIT
STATE OF HAWAII

GRANT T. NORRIS, Plaintiff, vs. HAWAIIAN AIRLINES, INC., Defendant.	CIVIL NO. 87-3894-12
GRANT T. NORRIS, Plaintiff, vs. PAUL J. FINAZZO; HOWARD E. OGDEN; HATSUO HONMA; and DOES 1-50, Defendants.	CIVIL NO. 89-2904-09 Volume 1

DEPOSITION OF TED T. TSUKIYAMA, ESQ.,

Taken on behalf of Plaintiff at the offices of Cades Schutte Fleming & Wright, 1000 Bishop Street, Honolulu, Hawaii, 96813, commencing at 1:08 p.m. on Thursday, July 12, 1990.

* * *

[p. 4] TED T. TSUKIYAMA, ESQ.,

Being first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. BOYLE:

Q Would you state your full name for the record, please.

A Ted T. Tsukiyama.

Q What is your address, Mr. Tsukiyama?

A Business address is 620 H-K Building, 820 Mililani Street, Honolulu, 96813.

Q Your home address?

A 2536 Sonoma Place, Honolulu, 96822.

Q What was Mr. Hipp talking to you about just a moment ago?

A What – whether emotional damages would be includable in the relief under the – under the Whistleblowers' Act.

Q Is that all he said?

A I never had a chance to say anything.

Q I see. Okay. Mr. Tsukiyama, as you know, your deposition is being taken today because you have been listed as a witness that Hawaiian Airlines intends to call at the trial of this action.

[p. 5] MR. HIPP: I'll object to that. Discovery is closed in the Hawaiian Airlines case. As Mr. Boyle has recognized –

MR. BOYLE: It's a consolidated case, Counsel. It's a stupid objection. Don't waste my time.

MR. HIPP: It's noted in Mr. Boyle's document filed in court – just filed before the judge today.

Q (By Mr. Boyle) Have you ever had your deposition taken before?

MR. HIPP: I'll finish my objection, please.

MR. BOYLE: Why don't you finish your objection at the end? You've made your objection. You're just cluttering up my record. I'm paying for the original. I don't want to hear your stupid statements for another three or four hours. You've made your statement. That's enough.

Q (By Mr. Boyle) Have you ever had your deposition taken before, Mr. Tsukiyama?

MR. HIPP: Excuse me. Let me finish my objection and then we'll go on.

MR. BOYLE: It's not an objection.

MR. HIPP: My objection –

MR. BOYLE: What is the objection to the form of the question, Counsel?

MR. HIPP: My objection is that –

[p. 6] MR. BOYLE: You're not making any objection to the form of the question, and therefore you're out of line.

MR. HIPP: My objection is that this deposition is for the Finazzo case only.

MR. BOYLE: I want the court reporter – look, I'm not going to take any more of Mr. Hipp's speeches

down. You know, if you want to get an agreement to have Mr. Hipp pay you for his speeches, that's fine, but I'm not paying for it.

Q (By Mr. Boyle) Now, have you ever had your deposition taken before, Mr. Tsukiyama?

A I believe so, but very vaguely.

Q Do you recall how many times you've had your deposition taken?

A Not more than once or twice.

Q Do you recall when it was?

A At least 7, 8 years prior.

Q Okay. Do you recall in what connection it was?

A I can't remember.

Q What is your understanding of the claim filed by Grant Norris against Hawaiian Airlines?

A He was – he's complaining of his termination from employment on the grounds that it was unjust and improper, but in particular because he, according to the

* * *

[p. 47] A No. That would – that's why the arbitration process is deemed to be final and binding except where it may be reversed on those four very narrow grounds that are provided for in the Chapter 658-9.

Q I understand that. If we had an arbitration. But we don't have an arbitration here, right?

A Well, it was in the process of being arbitrated.

Q And the grievant elected not to go forward with that procedure, right?

A All I can do is judge from the documents that were that I have here. I don't know what he did.

Q Okay. Well, what would they indicate that he did?

A Well, that at – before the third level hearing, his discharge was reduced to a suspension and he was offered reinstatement. I can only surmise that he didn't accept it because he is now in court.

Q Right.

A That's only a surmise.

Q Okay. Now, let's get back to the original question. You agree with me that any testimony you might give which interprets the Whistleblowers' Protection Act – the WPA – Section 378 of the Hawaii Revised Statutes, Section 378-61, et seq., would be a violation of the * * * [p. 52] Matsuzaki document that's dated August 3, 1987?

A Yes. And the last line of which says, "Decision: Mr. Grant Norris terminated as of this day, August 3, 1987, for insubordination."

Q Okay.

A That's what I read.

Q So is it your testimony that that's when he was fired?

MR. HIPP: I'll object to that.

A If that –

MR. HIPP: Incomplete hypothetical.

A – states a fact, that's the extent of my knowledge.

(Discussion off the record.)

Q (By Mr. Boyle) You're holding several documents in your hand. Perhaps you could tell us what they are.

A Well, examining that document dated August 3rd – there's a typographic on it. It should be "1987." It appears to be the hearing that the contract requires which must be had before a employee is suspended or terminated, and it is this employer's disciplinary action of termination that a grievant is grieving from. And then it went up through the grievance process, and the last thing we find is, at the third step it's been [p. 53] converted to a suspension and a reinstatement.

Q That's a suspension without pay?

A Yes.

Q That's also a warning to Mr. Norris that he's been a bad boy and the company is going to be watching him closely just in case he refuses to sign off any more unairworthy planes?

MR. HIPP: I'll object as the document speaks for itself.

A It's fairly common verbiage.

Q (By Mr. Boyle) But what does it mean? It's a threat, isn't it?

A It's a –

Q I have to tell you, Mr. Tsukiyama. I received a letter like that once when I was in school, and I took it – it

was from the dean of students, and I took it to mean a threat.

MR. HIPP: I'll object to that.

Q (By Mr. Boyle) Are you telling me that that letter is not a threat?

MR. HIPP: I'll object to that. Was your letter under a collective bargaining grievance process?

MR. BOYLE: Are you asking the questions now, Counsel?

MR. HIPP: I'll object to that as an incomplete [p. 54] hypothetical.

Q (By Mr. Boyle) Isn't that a threat?

A I would say it is not so much a threat as a warning to comply with industrial due process standards that a – an employee should not or cannot be disciplined without adequate notice of – notice in the way of a warning that a future repetition of certain conduct will lead to heavier disciplinary action, including possibly discharge.

Q Yes. It's a statement not to engage in the same conduct that got the grievant in that position in the first place, right?

A Well, the notice is there so that it cannot be said that the guy never was told by the company that if he tripped and fell on his face again, he would face these consequences, so the companies almost general – almost invariably have that kind of language.

Q In this case Mr. Norris had been insubordinate, correct?

A For – for refusing to sign off, he was considered insubordinate by the company.

Q Right.

A Yeah.

Q They were telling him, in effect, to sign off in the future, right?

[p. 55] A Not necessarily.

Q They were not?

A Not necessarily.

Q They weren't telling him not to engage in the same conduct that got him fired on July 31st, 1987?

A Well, I would say that he would have – he could abide by his conscience. And if this occurred again, he could refuse if he had a legitimate grounds for refusing on grounds of safety or he was not going to be a party to something that would – that was a risk or hazard to public safety. That would be an exception that – it's a defense to the – a well-recognized defense in the field of arbitration against an insubordination rap.

Q Does every harassment on the job rise to the level of a matter that you can take into the grieving process that Mr. Hipp has always referred to?

A Well, the general rule is that when you are ordered or directed by the company to do something, you obey, you comply –

Q That's correct.

A – and then file a grievance. So it's called "Obey now" "Perform now, grieve later." But there are these exceptions well – that's why I have my little book here that states that exception.

Q There's another individual in this case: Tom

* * *

[p. 59] – or general opinion that, looking at these bare facts and the statutory law and the contract and in making a very cursory comparison, my general impression would be that if this man had come to arbitration, that he would have gotten a – he would have been successful in proving his position – his case that he was improperly terminated for refusing to sign off on a matter that seemed to – allegedly seem to compromise with the airworthiness of the aircraft. And that's one of the recognized defenses of an insubordination case.

The case would have been in arbitration, would have been in front of an arbitrator. Once the arbitrator is selected, it probably could have been finished in two or three months. I'd say by the end of 1987, he would have had a final and binding determination of his grievance. He would have been reinstated, and his claim for relief would include not only getting his job back, but he would – the scope of relief could include all pay that he lost, any contractual rights, accrued rights that were suspended in the interim, such as seniority and accrued vacation, accrued sick leave, et cetera. All the contract rights. And basically he would have been what we call made whole,

meaning put back in the status quo as if he had not suffered – if he had not been improperly treated.

[p. 60] That's my general impression of the case, that I would say that his rights and remedies would have been superior to those seeking recourse through the courts, which is – as it's shown, is still pending, whereas through arbitration this would have been completed two years ago.

Q What is your understanding of what kinds of damages he can seek under the statute?

A Well, generally they come and ask, so I don't know what he would be asking. I know he would be asking for his job back. He'd be asking for back pay and restoration of all deprived contractual rights. If he had incurred, say, a private attorney, quite conceivably that would have been a but-for type expense: But for this inconvenience and impropriety, he would not have incurred attorney's fees.

Q What about general damages for, say, emotional distress –

A Well –

Q – flowing from the violation of the statute? Are you aware whether or not if he pursues – strike that.

Can you tell me whether or not, if you're the arbitrator in this particular case and Mr. Norris asks for damages for emotional distress, he would be awarded [p. 61] such damages.

A Well, I would – I would anticipate an objection from the employer that that would be a – something that

he could – he would have to file his claim, you know, under workman's comp. We would not intrude on something that would be his statutory remedy, but basically –

Q What if he – I'm sorry.

A I mean, without knowing, you know – generally the union or the union attorney will ask for various scope of relief, and we'd look at it. We'd look at it. But basically the formula is to make a person whole for whatever he has endured or suffered because or by virtue of the improper employer action which is deemed to be a violation of some right or rights under the contract.

Q Suppose the – I want you to assume for a second that the employee was threatened by a supervisor after the employee – after October – excuse me, July 31st, 1987. Would the emotional distress be covered by the worker's comp statute?

A Well, I – you know, I can't speak for what rights he has under workman's comp, and if it were pointed out or successfully argued by employer that I would be exceeding my jurisdiction – we do have jurisdiction.

[p. 62] Q Sure.

A But the jurisdiction of an arbitrator to afford relief is considerable, very broad. Ever since the U.S. Supreme Court in the famous 1960 Steel Worker trilogy – it's a set of three decisions involving the steel workers' union that gave broad authority to the arbitrator to not only determine the contractual rights but to afford the appropriate relief.

Q Can the arbitrator award damages, general damages, for emotional distress caused after – or while the

employee was not within the course and scope of his employment?

A That's a hard one to answer because you said "outside the scope of his employment."

Q Right.

A And –

Q As I understand it, you've indicated that Mr. Norris was fired on July 31st, 1987. Is that correct?

MR. HIPP: Most certainly not correct.

A Well, that was – that was the disciplinary action. It's – it's not the – you know, the record is left with him being reinstated, so I can't say he's – that was the company's disciplinary action, that he was terminated. But the company changed its position during the course of the grievance procedure, and if it had come

* * *

[p. 120] A. July 10, 1990 is the filing date.

And possibly the State Law on Arbitration Awards, chapter 658, of the Hawaii Revised Statutes.

Q. May I see that?

A. (Complying).

Q. Do you know why Mr. Hipp is whispering into your ear?

A. I can't hear.

Q. What did he say?

A. Something about legislative history. I think I mentioned that. Legislative background, including committee reports on the Whistleblower Act.

Q. Anything else?

A. That's the extent of the facts and the law that I have looked at.

Q. And your opinion, again, is that the claimant would have been better off if he had pursued his rights and remedies under the collective bargaining agreement?

A. That's how I see it.

Q. Let me get some definitions. The 'claimant' in this case is Grant Norris?

A. Yes.

Q. What do you mean he would have been "better off"?

A. I believe that, based on this record that I have just alluded to, that the collective bargaining agreement does provide Mr. Norris with rights and remedies pertaining to [p. 121] his claim which would be better or superior to that available to him under the State Whistleblowers' Act.

Q. If you may forgive me the impertinence, that almost seems to be begging the question. How is it better?

A. Okay. That calls for a long answer.

Q. Well, I trust that you will be asked at some point in time what you mean by 'better.' And that's my question now.

A. Is there a question?

Q. Yes, sir.

A. What I just gave you is the bottom-line.

Q. I know that's the bottom-line. And I asked you earlier what did you mean by the term "better off" as you used it in your opinion 'The claimant would have been better off if he had pursued the rights and remedies available to him under the collective bargaining agreement.' And you then, in response to that question, said that 'Under the collective bargaining agreement his rights and remedies were better.'

MR. HIPP: Or 'superior'.

A. Or superior.

Q. Or superior. Well, what's the different between 'better' or 'superior'?

A. Well, they are both generic terms far more advantageous than what it is being compared to.

Q. What was it being compared to?

A. The Whistleblowers' Act, rights and remedies.

[p. 122] Q. Was it being compared to anything else?

A. No, not based on this record.

Q. Well, he has a complaint here, right?

A. yes.

Q. And are you saying that his remedies under the collective bargaining agreement afford him rights and remedies that are superior to the prayers for relief in the complaint?

A. He would get the equivalent or better relief if he went through the arbitration forum.

Q. Is he entitled to punitive damages in the arbitration forum?

A. He may.

Q. How much? What are the ranges of punitive damages that he could look forward to in the arbitration forum?

A. I can't answer that in the absence of some specific facts.

Q. Well, what are the ranges of punitive damages that he could look forward to in front of the Honolulu . . . State of Hawaii jury?

MR. HIPP: I'll object to that. Incomplete hypothetical. Assumes facts not in evidence. Vague and ambiguous.

A. That's speculative for me to try to say in the absence of knowing, you know, what he's actually claiming he suffered as a result of this matter.

Q. How about this: He's claiming back pay of $65,000. He's claiming projected losses of $365,000. He is claiming

* * *

[p. 145] court reporter to read back the last couple of questions and answers.

(Whereupon, the section in question was read).

A. We could have reached an arbitration decision as long as there is satisfactory proof that what Mr. Norris

was complaining about was a threat to what he believed health and safety.

Q. Well, would you have been able to make a decision based solely on Mr. Norris' testimony? And the testimony of the Hawaiian Airline's management personnel? Or would you have preferred to have the testimony of the individuals who can corroborate Mr. Norris' version of the events.

MR. HIPP: Objection; vague and ambiguous. Assumes facts not in evidence. And an incomplete hypothetical.

A. I believe that Mr. Norris and other mechanical personnel around him could show that based on the specs that this part that he was complaining of was damaged, or non-conforming, and was a questionable piece of equipment to re-install.

Q. Well, if they bring in three mechanics – Mr. Norris comes in and testifies that he didn't think the part had the specifications and that he asked his immediate supervisor to show him where in the manual it said that that met specifications. That would be his testimony. I want you to assume that for a minute.

[p. 146] And then Hawaiian Airlines, at that point, brought three people in to testify that in their considered opinion, the matter met . . . the part met specifications. And that Mr. Norris' refusal to sign off on that part constituted insubordination.

Are you telling me that you would have, at that point, decided in Mr. Norris' favor?

MR. HIPP: I'll object to that as vague and ambiguous. Incomplete hypothetical. Assuming facts not in evidence.

MR. BOYLE: Well, I don't know what you mean by "Incomplete hypothetical." But I'm certainly not going to read Mr. Tsukiyama the deposition of every single mechanic who has been deposed in this case.

My question stands.

Q. Do you remember what my question was?

A. I would accept Mr. Norris' subjective believe, as long as there was some reasonable foundation that he sincerely felt that this item was non-conforming and would be a compromise to the safety of the aircraft.

Q. You would accept that over the sworn testimony of the . . . for example, his supervisor?

A. Well, I think –

MR. HIPP: I'll object. Vague and ambiguous. Assumes facts not in evidence. Incomplete hypothetical.

[p. 147] A. The issue . . . or the context where that fact would come in is whether he was justified in refusing to sign off, I believe is the term.

Q. What kind of evidence would you want to see as an arbitrator to determine whether or not he was justified in refusing to sign off?

A. I don't think we have to determine that, in fact, he was right or wrong. But that as long as there's a reasonable foundation for his belief. And according to the facts . . . you know, I think it said the specs called for

.005/8" and he could show that it was, you know, way off specs. And evidence of that type.

Q. Okay. Let's suppose that Mr. Hipp was the attorney representing Hawaiian Airlines. Would you anticipate from your previous experience with Mr. Hipp, that Mr. Hipp, at this point, would roll over and play dead and not put on any witnesses? Or introduce any testimony to refute Mr. Norris' story?

MR. HIPP: I'm going to object to that as vague, ambiguous; assuming facts not in evidence. Incomplete hypothetical. And not reasonably calculated to lead to discovery of relevant evidence.

A. Well, I would assume that the company would bring in first the supervisor –

Q. That's Mr. Culahara in this case. Do you know one way or

* * *

[p. 158] A. Well, just to add that it goes much faster and smoother in an atmosphere that is considerably less adversarial than in court. And most arbitrations are over within a day and . . . at least the factual portion. And then the parties have the option whether to render final argument orally or by written brief.

But . . . the whole process is much more expeditious and informal. And it is between parties that have a continuing on-going relationship, rather than two strangers that do battle in court and never see each other again.

Q. Are there any other grounds upon which you base your opinion that the rights and remedies set forth

in the collective bargaining agreement are 'better' or 'superior' to the rights and remedies set forth in the Whistleblower Protection Act?

A. Well, like I said, this contract is unusual, in that it does have provisions which, I think, protect an employee in Mr. Norris' position with regard to refusing to sign off or complaining about what he believes to be unsafe work . . . or unsafe practices.

Then we get into . . . this would primarily come up in the context of 'Was he insubordinate but for refusing to sign off?' And, like I pointed out in the earlier deposition, that there are these well-recognized exceptions . . . or defenses to being declared insubordinate where the employee [p. 159] can justifiably show that what he is protesting or complaining about does, in fact, impact health or safety of either himself, or his fellow workers, or the work place in general.

In this case, it would be, maybe the safety of the passengers.

Q. Well, the inclusion of this particular provision –

MR. HIPP: Are you going to let him finish? Did you want the full answer to your question concerning rights and remedies?

MR. BOYLE: I thought he was finished.

MR. HIPP: – do you want to cut him off?

MR. BOYLE: I thought he was finished.

MR. HIPP: He hasn't even covered remedies –

MR. BOYLE: Why don't you just shut-up, Counsel.

Q. BY MR. BOYLE: Did I interrupt you, Mr. Tsukiyama?

A. (No audible response).

MR. HIPP: Would you read the question back?

(Whereupon, the section in question was read).

A. Well, as I was pointing out, this agreement, in an unusual fashion, does cover this so-called Whistleblower incident . . . exception to insubordination, very specifically in the contract. But even if the contract didn't, the general arbitration law would render . . . make available these defenses based on the grounds of health or safety the [p. 160] justification that the employer/employee would raise.

And these would all be addressed to the propriety of employer's disciplinary action; which, initially, resulted in his termination and . . . it ended up during the grievance process, to suspension.

As I indicated, I think . . . particularly because the contract, itself, recognizes this situation . . . or anticipates this situation in writing . . . you know, that he has a much stronger foundation to stand on in this case.

If I had it, and maybe three or four or five other arbitrators, who would sit and hear this type of case, based on what facts are revealed in the Complaint . . . and assuming that they can be established as true . . . that this complainant would, I think, have a very good chance of prevailing in having his grievance sustained.

In which case, the relief that he could ask the arbitrator and be awarded, would be just as good or better than what is provided in the law. But, basically, it's to make him as good as he was, as if this had never happened.

And when I say 'better', I'm referring to the fact that the courts allow a broad latitude of arbitral discretion in quoting appropriate relief. And . . . so in that sense, depending on the particular facts or the claims or the prayer made, that as long as there were facts to substantiate it, that he could get maybe some measures of

* * *

[p. 171] award Mr. Norris his job back, as a practical matter, wouldn't you have expected . . . at base maintenance out here, with all these people gossiping and talking about the FAA . . . wouldn't you have expected that he would be the subject of a great deal of retaliation by managers and co-employees?

MR. HIPP: Objection; vague, ambiguous, incomplete hypothetical.

A. You're giving me a scenario that's not in the Complaint.

Q. No. But I'm asking you . . . I'm asking you on the basis that you're a distinguished practitioner in the law; you're an eminent arbitrator . . . you're also a human being. And quite apart from the fact that you're a lawyer, an arbitrator, so forth and so on, wouldn't you expect the company and individuals at that company to make Mr. Norris' life as miserable as possible once you had awarded him his job back? Either working directly under

Mr. Culahara again? Or working under Mr. Matsuzaki? Or some other manager?

A. Well, accepting this worst scenario that you are describing is brought out in an arbitration. One of the acts of remedy or relief, particularly if requested by the union, is an injunctive-type of cease and desist directive against management . . . and perhaps even individuals in particular, which would become part of the award. And that award is always enforceable in court.

* * *

[p. 176] collective bargaining agreement between Eastern Airlines and the International Association of Machinists didn't prevent massive falsification of records, intimidation of employees, and threats of physical violence against mechanics; did it?

MR. HIPP: Objection; assumes facts not in evidence. Incomplete hypothetical. Not reasonably calculated to lead to the discovery of relevant evidence.

A. I'm not familiar with what happened at Eastern Airlines.

Q. Well, you said that this Whistleblowers' Protection in the CBA . . . collective bargaining agreement . . . was, to use your term, 'unusual'. And you stated that twice.

And let me represent to you – strike that.

Have you seen any other collective bargaining agreements between the International Association of Machinists and other airlines?

A. With this clause in it?

Q. Yes.

A. No; I can't recall. That's why I said it was unusual to me.

Q. Well, did you see that clause included in any other contracts . . . collective bargaining agreements you have ever looked at between airlines and machinists?

A. Not that I can recall.

Q. And how many collective bargaining agreements between airlines and machinists have you looked at?

A. Six to ten airlines, maybe.

[p. 177] Q. How far back do those contracts date?

A. I've been arbitrating for 32 years. My earliest airlines cases would go back at least 25 years.

Q. Well, I mean of the six to ten . . . Any of those six to ten have you reviewed recently?

A. No . . . no. Not to look for this kind of language.

Q. Whistleblower protection?

A. Yeah. Or in the context of protecting an employee who is safety conscious.

Q. Can you make any judgments one way or another whether the inclusion of such a provision in the collective bargaining agreement ultimately results in the protection of the employees?

A. It helps, in that it is there in black and white in the parties' agreement. That it was of such concern that they chose to put it in writing. And, therefore, when a

grievance comes up to arbitration, within this factual context, the arbitrator has one additional sanction or standard to apply in determining whether management's disciplinary action was just . . . was for cause, or not.

Q. Well, actually, this particular collective bargaining agreement kind of reminds me of the soviet constitution. It gives lots of rights and remedies, none of which are ever enforced, because it would be sheer suicide to ask the authorities to enforce them.

[p. 178] I take it that you believe when there is whistleblower . . . alleged whistleblower protection . . . In this particular agreement . . . collective bargaining agreement, you are going to – The very fact that you would enforce it if the situation were brought to your attention, is a sufficient basis for you to say that it does offer some protection to the employee?

MR. HIPP: I'll object to that as incredibly vague and ambiguous.

MR. BOYLE: Well, which part? The part that says the agreement reminds me of the soviet constitution, with lots of rights and remedies for everybody, none of which are ever exercised? And if they are exercised by anybody, the exerciser ends up in Siberia . . . ?

MR. HIPP: That, among many other parts of the question.

A. This Mr. Norris, in question, was in the process of enforcing his rights under that contract clause. And if it had continued to come to arbitration, and assuming that I were appointed as the arbitrator, I would be impressed with the fact that the parties had taken the

pains to adopt this kind of protection for this whistleblower safety-conscious-type of employee.

That's what I mean when I say it is 'unusual.' I haven't seen it . . . that I can recall, in other contracts.

* * *

[p. 181] type relief. But that's not to guarantee that the company is going to heed it. Because an arbitrator is called in on a case-by-case basis. He has no continuing authority over the union and the employer. Unless he enjoys a permanent umpire status, which is a special arbitrator status. He is the standing judge of all grievances that are brought to arbitration. They don't select anybody else.

Q. Wouldn't it be easier and of greater deterrent value if in the first case that was brought to your attention you imposed an award of punitive damages to teach the company not to engage in the same conduct again?

MR. HIPP: Objection; vague and ambiguous. Incomplete hypothetical. Assumes facts not in evidence. Lacks foundation. Not reasonably calculated to lead to the discovery of relevant evidence.

A. As an arbitrator, I would only respond to a request for punitive damages if it is raised by the grievant or his union. And consider the supporting facts and evidence that he would bring to justify.

Q. So, under certain circumstances, you would award punitive damages?

A. I would certainly consider it. I wouldn't rule it out, I think, is what I'm saying.

Q. Have you ever awarded punitive damages?

A. Perhaps something similar, but not punitive damages, as [p. 182] such . . . like, treble damages . . . you know, that kind of thing. Q. No. I mean, have you ever sat down as an arbitrator, and been furnished with information of what the net worth is of a company and, in an effort to deter that company from ever engaging in that kind of conduct again, made an award in punitive damages?

A. I have not. I –

Q. As – I'm sorry, I interrupted you.

A. – have not imposed punitive damages, as such, that I can recall. It's a rather rare . . . it's a very rare instance that would even be brought up in an arbitration . . . very unique circumstances.

Q. Is the conduct that is alleged in Norris's Complaint, in your opinion, the kind of conduct that would elicit an award of punitive damages?

MR. HIPP: I'll object to that. Not reasonably calculated to lead to the discovery of relevant evidence, since there are many counts alleged in that Complaint.

Q. I'm saying the conduct . . . the Complaint taken as a whole? Is that the kind of conduct that you would say would elicit . . . should elicit an award of punitive damages in an arbitration?

MR. HIPP: Objection; vague, ambiguous; fails to . . . incomplete hypothetical. Assumes facts not in evidence. Includes counts other than the Whistleblower

* * *

[p. 191] call "make whole" remedies. And I don't see where what the company would be hit with, would differ that greatly in either case.

You know, I did start out to say what are the remedies in arbitration . . . and besides reinstatement, of course, he could get his whole back pay. He would not lose seniority. He would not lose his accrued vacation. His accrued sick leave. All of the accruals that should have kept accruing and running, would be restored to him. And if he could show . . . you know, out-of-pocket type actual damages, that could be considered in arbitration as well as under the law.

So the company would be hit virtually in the same degree under either way. So it's hard to say whether they have more to lose. If they go through court, though, they're . . . as this case has shown . . . they're in it for a much longer time. They have legal expenses.

Q. Is there a deterrent value in the process itself?

A. I would imagine that there is –

MR. HIPP: I'll object to that as a vague and ambiguous as to what "process" you're talking about.

MR. BOYLE: Well, the witness certainly knowswhat I'm talking about.

Q. Please go on.

A. – the threat, or the possibility of being involved in a long litigation is . . . has deterrent aspects to it. That is [p. 192] why, I take it, in this case . . . the company

retrenched from its initial discharge action, and reduced it to a suspension.

Q. Because of fear of a lawsuit?

A. No. In trying to . . . you know, trying to settle . . . resolve this whole thing. Whether it be continuation of arbitration or faced with a court litigation.

Q. Well, you don't consider Exhibit 4 to be a concession by Hawaiian Airlines that its manager or managers may have been wrong, do you?

A. Well, as in all settlements, they try to avoid judgmental assessments of right or wrong. And, in their mind, when they say are they are offering to mitigate the punishment, I believe mitigation is a proper word or terminology. Because there is a vast difference in the seriousness of a discharge penalty from one that is suspension of X number of days or weeks. I've forgotten what it was in this case. It is a reduction.

Q. Let's assume for the moment that all of the well-pleaded allegations of the Complaint are true.

May I see the exhibit?

A. (Complying).

Q. As far as you would be concerned, as an arbitrator with the company – Strike that.

Do you have any understanding of what this third [p. 193] paragraph or Mr. Ogden's letter means. "You are hereby warned that any further instance of failure to perform your duties in a responsible manner will result in consideration of more severe disciplinary action to

include discharge." Do you have any understanding of what Mr. Ogden is saying in that letter?

A. Yes. I think it has . . . it reflects at least two elements. One, is that they are applying principles of progressive corrective discipline. In other words, for a series of misconduct management can start with lesser or moderate penalties, and progressively, gradually, in an effort to correct, increase them. And . . . so if they reduce a discharge back to suspension, which is a lesser penalty, they are on the progressive discipline . . . or invoking the progressive discipline track. And they are saying, 'We're going back to square number three, instead of square number one.'

The other is that one of the cardinal elements of arbitral due process is that there has to be adequate notice, or forewarning, of the consequences of misconduct . . . or repetition misconduct. And so it is almost standard customary verbiage that it includes similar language like this. 'If you trip over yourself in the future, for the same kind of thing, this is what's in store for you.' So it's a forewarning . . . 'forewarning' is the word, I guess, we would use.

[p. 194] Q. 'Don't do this again, or next time no Mr. Nice-guy?'

A. Yeah. So that the employee is fully apprised of the consequences of repetitious misconduct.

Q. "Repetitious misconduct" . . . being in this case refusing to sign off on a defective part?

A. That kind of thing.

Q. If Mr. Norris had come to you, could he have gotten special damages, let's say . . . for the cost of, say, going to see a psychologist or psychiatrist?

A. (No audible response).

Q. If he had prayed for it, of course. And if he had made proper application. And showed you . . . 'Mr. Tsukiyama, here's a list of my special damages. And included, herewith, are all of the psychologists that I saw, and all of their bills.'

MR. HIPP: I'll object as an incomplete hypothetical.

A. As an arbitrator I would and I could consider that type of request, as long as the foundation of facts are there; with an undergirding of . . . you know, good faith. That I felt this guy is not putting it on. He's . . . he was legitimately emotionally –

Q. Traumatized?

A. – distressed.

Q. Distressed.

* * *

EXHIBIT 8

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Attorney and Arbitrator/Mediator.

Born December 13, 1920.

Attended University of Hawaii 1939-1941;

Indiana University A.B., 1947;

Yale Law School, LL.B., 1950.

Office of City and County Attorney, 1951-1956;

Chief Counsel, Honolulu Redevelopment Agency, 1956-1969;

Private law practice since 1956 to present.

Legal Affiliations:

Bar Association of Hawaii;

Supreme Court Bar Examining Committee.

Arbitration Experience and Affiliations:

Ad hoc arbitration, commencing in private labor-management sector from 1958, public labor-management sector from 1970, commercial dispute and construction industry dispute arbitration from 1965;

Member: National Academy of Arbitrators 1966 to present;

Board of Governors: National Academy of Arbitrators 1982-1984;

Vice President: National Academy of Arbitrators 1990-1992;

Chairman: Hawaii Regional Advisory Council, American Arbitration Association 1971-1985;

Board of Directors: American Arbitration Association 1985-1989;

Arbitration panels: Federal Mediation and Conciliation Service; AAA labor and commercial dispute panels; Hurricane Iwa Disputed Claims Settlement Program; Hawaii Court-Annexed Arbitration Panel;

Mediation panels: American Arbitration Association and Mediation Specialists of Hawaii Panel

Member: Asian-African Legal Consultative Committee International Panel; Regional Center for Commercial Arbitration, Kuala Lumpur, Malaysia;

Island Port Arbitrator for Hawaii Longshore Industry and ILWU since 1963;

Chairman: Hawaii Employment Relations Board 1964-1974;

National Association of State Labor Relations Agencies: Vice President 1964-1965; President 1966-1967;

Industrial Relations Research Association – Hawaii Chapter: President 1970-1971

Case Load: Completed over 600 arbitration decisions from 1958 to date.

Completed over 40 mediation and mediation-arbitration (med-arb) cases.

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GRANT T. NORRIS

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

GRANT T. NORRIS, Plaintiff, vs. HAWAIIAN AIRLINES, INC., Defendant.	Civil No. 87-3894-12 (Other Civil Action) AMENDED NOTICE OF REMAND; EXHIBITS "A" – "B"; CERTIFICATE OF SERVICE (Filed Sept. 9, 1991) Trial Date: May 11, 1992
GRANT T. NORRIS, Plaintiff, vs. PAUL J. FINAZZO; HOWARD E. OGDEN; HATSUO HONMA; and DOES 1-50, Defendants.	Civil No. 89-2904-09 Trial Date: May 11, 1992

AMENDED NOTICE OF REMAND

I HEREBY CERTIFY that attached hereto as Exhibits "A" and "B" are true, correct, and certified copies of (1) the Memorandum and Order, filed on March 28, 1998

[sic], in *Norris v. Hawaiian Airlines, Inc.*, Civil No. 88-00010 HMF and (2) the Memorandum and Order, filed on November 21, 1988, in *Norris v. Hawaiian Airlines, Inc.*, Civil No. 88-00010 HMF.

It appears that when Norris filed the Notice of Remand with the Clerk of the First Circuit Court, State of Hawaii on August 29, 1991, which attached as Exhibit "A" the letter from Walter A.Y.H. Chinn, Clerk of the United States District Court for the District of Hawaii, dated August 27, 1991, along with the certified copies of the above-mentioned Memoranda and Orders, the Clerk of the First Circuit Court, State of Hawaii did not include as part of the filed Notice of Remand the two certified copies of the Memoranda and Orders. The two certified copies of the Memoranda and Orders were returned to Norris's counsel.

In an attempt to ensure that certified copies of the federal court's March 28, 1988 and November 21, 1988 remand orders are filed with the First Circuit Court, State of Hawaii, Norris submits this Amended Notice of Remand, to which the certified copies of the remand orders are attached as Exhibits "A" and "B." These orders remanded Counts I through IV of the complaint in the case entitled *Grant T. Norris v. Hawaiian Airlines, Inc.*, Civil No. 88-00010 HMF, to the First Circuit Court of the State of Hawaii, in Civil No. 87-3894-12.

DATED: Honolulu, Hawaii, September 9, 1991.

/s/ illegible
EDWARD deLAPPE BOYLE
SUSAN OKI MOLLWAY
ERNEST H. NOMURA
CADES SCHUTTE FLEMING
& WRIGHT

Attorneys for Plaintiff
GRANT T. NORRIS

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GRANT T. NORRIS, Plaintiff, vs. HAWAIIAN AIRLINES, INC., a Hawaii corporation, Defendants.	Civil No. 88-00010 HMF MEMORANDUM AND ORDER (Filed March 28, 1988)

Grant Norris (Norris), an airline mechanic formerly employed by Hawaiian Airlines, Inc. (HAL), brought an action against HAL in Hawaii state court for wrongful termination. Norris pled five counts: Count I alleged that Norris was discharged in violation of public policy as expressed in Federal Aviation Act and regulations; Count II alleged a violation of the Hawaii Whistleblowers Protection Act, a state statute that purports to protect employees against retaliatory firings; Count III alleged that Norris had suffered emotional distress as the result of HAL's actions; Count IV sought punitive damages from HAL for allegedly outrageous conduct; and Count V stated a claim for breach of the collective bargaining agreement. HAL removed Norris's action to this court asserting that Norris's state law claims were preempted by federal labor law. Norris has moved to remand, arguing that his claims are not preempted and the federal court is without jurisdiction. HAL opposes the motion and has moved for summary judgment on the grounds

that Norris's claims are preempted by federal law and must be dismissed for failure to exhaust the grievance procedures established by the collective bargaining agreement.

I. FACTUAL BACKGROUND

Norris was employed by HAL as an FAA licensed aircraft mechanic from February 2, 1987 to August 3, 1987. *See* Norris Affidavit, attached to Motion to Remand [hereinafter Norris Aff.] Norris's FAA license carried an Airframe and Powerplant rating which gives the mechanic so rated the authority to approve and return to service an aircraft after the mechanic has made, supervised, or inspected certain repairs performed on the aircraft. *See* 14 C.F.R. §§ 65.85, 65.87 (1987). However, the mechanic may not approve for service any aircraft or part to which repairs have been made that do not conform to the applicable FAA regulations, and any fraudulent entry in any record or report required by the FAA regulations is cause for suspending or revoking the mechanic's FAA license. 14 C.F.R. § 43.12 (1987).

On July 14, 1987, Norris was servicing one of HAL's aircraft and noticed that one of the tires was worn. When the tire was removed Norris discovered that the axle sleeve, which normally has a mirror smooth surface, was scarred and pitted. Such damage to the surface of an axle sleeve can cause the sleeve to rub against the wheel bearing. The heat generated by this friction, combined with the high speed at which the wheel bearing spins on landing, can result in the bearing fusing to the sleeve and the ultimate failure of the landing gear. Norris Aff. at

paragraphs 5-10. Norris believed the part was unsafe and should be replaced, but his supervisor instead ordered the mechanics to hand sand the axle sleeve and put over it a new bearing and tire. *Id.* at paragraphs 11-13. Later the supervisor asked Norris to sign the maintenance record for installation of the tire, but Norris refused to sign unless the supervisor "could show me in the maintenance manual where it said that the axle [sleeve] was in a satisfactory condition." The supervisor did not consult the manual and told Norris that if he did not sign he would be suspended. Norris did not sign and was suspended. The next day he called the FAA and told them that there was a problem with the HAL aircraft he had serviced. *Id.* at paragraphs 15-21.

A termination hearing was held pursuant to Article XV of the collective bargaining agreement and Norris was discharged for insubordination. *See generally* Agreement Between Hawaiian Airlines, Inc. and the International Association of Machinists and Aerospace Workers (AFL-CIO), attached as Exhibit 1 to Motion for Summary Judgment [hereinafter Agreement or collective bargaining agreement]. Norris then filed a grievance regarding his termination and Norris's union representative referred the grievance for a Step 3 hearing pursuant to the Agreement. However, before the Step 3 hearing commenced, HAL issued a letter dated September 10, 1987, mitigating Norris's punishment from termination to a suspension without pay. Exhibit 3 to Motion to Remand, HAL then wrote to the union representative stating HAL's position that since Norris's punishment had been mitigated there was no need for the Step 3 hearing. *Id.*, Exhibit 4. Norris did not respond to HAL's September 10 letter and instead

filed this action in state court. The Step 3 grievance hearing was not held.

II. JURISDICTION

A. Removal Jurisdiction

I conclude at the outset that even if Counts I through IV of Norris's complaint are not preempted by federal labor law, Count V, which states a claim for breach of the collective bargaining agreement, clearly is a claim arising under federal law over which this court have removal jurisdiction. The terms and conditions of Norris's employment with HAL are governed by the collective bargaining agreement, as Norris concedes in Count V of his complaint. The Railway Labor Act (RLA), 45 U.S.C. §§ 151-185 governs labor relationships in the airline industry. *International Ass'n of Machinists v. Central Airlines*, 372 U.S. 682, 685 (1963); *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 191 (9th Cir. 1983); *Fechtelkotter v. Air Line Pilots Ass'n*, 693 F.2d 899, 902-03 (9th Cir. 1982). A claim for breach of an agreement governed by the RLA arises under federal law. *See, Scott v. Machinists Automotive Trades, District Lodge No. 190*, 827 F.2d 589, 591 (9th Cir. 1987) (claim under § 301 of the LMRA for breach of the collective bargaining agreement removable as a federal question); *Schroeder, supra*, at 191 (claims based on conduct not authorized by a collective bargaining agreement governed by the RLA arose under federal law and removable). Finally, this federal question "is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams*, 107 S.Ct. 2425, 2429 (1987).

Since federal jurisdiction at least over Count V exists, HAL could properly remove the entire action. *Lepucki v. Van Wormer*, 765 F.2d 86 (7th Cir. 1985), *cert. denied*, 474 U.S. 827 (1985); *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1430 (9th Cir. 1984). Once an action has been properly removed on the basis of a federal claim, the district court may exercise jurisdiction over pendent state claims even if the federal claim has been dismissed,[1] or it may, in its discretion, remand the state claims to state court. *Carnegie-Mellon University v. Cohill*, 108 S.Ct. 614, 622 (1988); *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-27 (1966); *Salveson, id.* In this case, however, HAL urges that Counts I through IV are completely preempted by federal labor law and thus are not pendent state claims subject to the court's discretion to remand.[2] If Norris's claims are completely preempted there are no state claims

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[1] In its motion for summary judgment, discussed *infra*, HAL argues that Count V, as well as Counts I through IV which it believes preempted, must be dismissed for Norris's failure to exhaust the grievance procedures of the collective bargaining agreement.

[2] HAL argues that the preemptive force of the RLA is so extraordinary that it converts ordinary state common law claims into federal claims. HAL acknowledges that if federal preemption is asserted as a defense to state law claims, those claims are not converted into federal law claims. Norris argues that HAL is simply asserting preemption as a defense. To the extent that these arguments are addressed to the question of removability, they need not be resolved since I have concluded that the complaint was properly removed on the basis of Count V even if Counts I through IV are not preempted. However, these arguments are also pertinent to the question whether any claims can be remanded to state court. *See Price v. PSA, Inc.*, 829 F.2d 871, 875 (9th Cir. 1987). They are therefore discussed *infra*.

to be remanded to state court. *Price v. PSA, Inc.*, 829 F.2d 871, 875 (9th Cir. 1987) (if state law claims are completely preempted by RLA, district court has no discretion to remand claims to state court). If, on the other hand, Norris's claims are not completely preempted then this court has no jurisdiction, other than pendant, over those claims and they may be remanded to state court if appropriate. *See, Carnegie-Mellon, supra*, 108 S.Ct. at 622 (court has discretion to remand pendent state law claims). The question is thus whether Counts I through IV are preempted.

B. Preemption

In some instances the preemptive force of a federal statute will be "so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim.' " *Caterpillar*, 107 S.Ct. at 2430. if an area of state law has been completely preempted, "any claim purportedly based on that preempted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Id.* Federal labor law, especially as developed under § 301 of the Labor Management Relations Act (LMRA), is an area in which the complete preemption doctrine is often applied. *Id.*

At the outset HAL urges that the preemption analysis developed under § 301 of the LMRA is equally applicable to a case involving the RLA, citing *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031, 1045 (7th Cir.), *cert. granted*, 108 S.Ct. 226 (1987). I have some doubt that this is so in view of the recent decision of the Ninth Circuit in *Price v. PSA, Inc.*, 829 F.2d 871 (9th Cir. 1987).

In *Price* the Ninth Circuit declined to extend the broad rule of preemption developed under § 301 of the LMRA to claims involving a collective bargaining agreement governed by the RLA. 829 F.2d at 875-76. Instead, the Court held that a state law claim is completely preempted by federal law only if Congress has " 'clearly manifested an intent' to convert a state law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Id.* at 876. Because the RLA does not contain a civil enforcement provision, as does § 301, the Court found that "Congress has not indicated, as it did with LMRA § 301 . . . , that the RLA is 'so powerful as to displace entirely any state cause of action.' " *Id.* (quoting *Metropolitan Life Ins. Co. v. Taylor*, 107 S.Ct. 1542, 1546 (1987)). The Court held:

> Absent a direct expression of congressional intent to create federal jurisdiction for all causes of action within the scope of Section 2, Fourth of the RLA, we believe we must abide by the well-pleaded complaint rule, Congress or the Supreme Court can steady us if either finds our step faulty. We hold that plaintiff's state law causes of action are not completely preempted by the RLA.

Id. at 876. The Court in *Price* conceded, however, that PSA might still argue federal preemption as a defense to the plaintiff's state law claims. *Id.* at 876.

Price involved two general claims under state law: 1) claims predicated on the violation of public policy expressed in California Labor Code §§ 922 and 923, which prohibit retaliation for union organizing activities, and 2) claims based on violation of the public policy inherent in

California Code of Civil Procedure § 1209(a)(5), which prohibits disobedience of lawful court orders. *Id.* at 872. The RLA, in § 2, Fourth, 45 U.S.C. § 152, Fourth, prohibits carriers from denying or in any way questioning the right of employees to unionize. None of the provisions of § 2 of the RLA contain a civil enforcement provision.

Price relied on two recent Supreme Court cases which considered federal preemption of state law claims. First, in *Caterpillar v. Williams*, 107 S.Ct. 2430 (1987), the Supreme Court held that state law claims for breach of individual employment contracts were not completely preempted by § 301 of the LMRA. In *Caterpillar* the Court emphasized that an employee "covered by a collective bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied on is *not* a collective bargaining agreement." *Id.* at 2431-32 (emphasis in original). The *Caterpillar* Court noted that even though the state law claims were not completely preempted so as to permit removal jurisdiction, the employer could nevertheless argue as a defense in state court that the state law claims were preempted by federal law. *Id.* at 2432. The Court stated that a claim would be preempted when "the plaintiff invokes a right created by a collective bargaining agreement," but not when the defendant merely injects the federal question as a defense to a state law claim. *Id.* at 2433.

In the second case, *Metropolitan Life Ins. Co. v. Taylor*, 107 S.Ct. 1542 (1987), the Supreme Court held that an employee's state law claims for breach of contract and wrongful termination were completely preempted by ERISA. 107 S.Ct. at 1548. The Court stated that it was

deciding the question expressly left open in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), to wit: whether state law claims within the scope of ERISA's civil enforcement provision, § 502(a), 29 U.S.C. § 1132(a), were completely preempted. *Id.* at 1547. The *Metropolitan* Court found complete preemption, however, only because "the language of the jurisdictional subsection of ERISA's civil enforcement provisions closely parallels that of § 301 of the LMRA." *Id.*

The Court noted that "[f]ederal pre-emption is ordinarily a defense to plaintiff's suit" and as such "does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to a federal court." *Id.* at 1546. In a companion case, *Pilot Life Ins. Co. v. Dedeaux*, 107 S.Ct. 1549 (1987), the Court analyzed the preemptive effect of ERISA as a defense and held that state common law tort and contract claims for improper processing of a claim for benefits were preempted by ERISA. *Id.* at 1556. The *Metropolitan* Court went further and found that Congress had so completely preempted the area that any civil complaint within the scope of ERISA's civil enforcement provision was necessarily federal in character and subject to removal to federal court. The Court stated:

> Even with a provision such as [ERISA's civil enforcement provision] that lies at the heart of a statute with the unique pre-emptive force of ERISA . . . , however, we would be reluctant to find that extraordinary pre-emptive power, such as has been found with respect to § 301 of the LMRA, that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.

> But the language of the jurisdictional subsection of ERISA's civil enforcement provision closely parallels that of § 301 of the LMRA. . . . [The legislative history of the provision also] sets out this clear intention to make [ERISA] suits brought by participants or beneficiaries federal questions for the purposes of federal court jurisdiction in a like manner as § 301 of the LMRA.

107 S.Ct. at 1547 (citations omitted).

The Ninth Circuit in *Price* found that the RLA did not have the preemptive force of ERISA or § 301 of the LMRA because it contained no similar civil enforcement provision and revealed no clear congressional intent to "create federal jurisdiction for all causes of action within the scope of Section 2, Fourth of the RLA." 829 F.2d at 876. Although *Price* was concerned only with Section 2, Fourth of the RLA, a section not applicable to Norris's claims, I believe the rationale of *Price* applies equally to this case. Although HAL argues that the RLA preempts Norris's claims, it does not identify any particular provision of the RLA that it believes preemptive. Section 2, First and Second of the RLA arguably cover Norris's claims, but neither of these provisions has a civil enforcement provision. In sum, I conclude that under *Price* Norris's state law claims set forth in Counts I through IV of his complaint are not completely preempted by the RLA and this court therefore does not have subject matter jurisdiction over those claims except to the extent that they are pendent to a federal claim.[3]

---

[3] Even though Count I alleges a discharge in violation of public policy, as expressed in FAA regulations, it does not state on its face a federal claim. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986) (incorporation of a federal standard in a state law cause of action does not create a federal question when Congress has not provided a private action for violations of that standard).

I emphasize that HAL may still have a good federal defense to Norris's state law claims. The RLA does exhibit a congressional intent that certain disputes between an employee and employer covered by the RLA be resolved only by the grievance procedures specified and not by the courts. *Atchison T & S.F. Ry. Co. v. Buell*, 107 S.Ct. 1410, 1414 (1987); *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1978); *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972); *Lewy v. Southern Pacific Transp. Co.*, 799 F.2d 1281, 1289-92 (9th Cir. 1986). It may be that the state courts do not have jurisdiction over Norris's claims because of the preemptive effect of the RLA's administrative grievance procedures. But such preemption is a defense which can be addressed by the state courts; it does not convert Norris's claims into federal claims for jurisdictional purposes.

I am also aware of the cases from this Circuit which have held, contrary to *Price*, that state law claims implicating a collective bargaining agreement covered by the RLA present a federal question and are removable to federal court. *See, e.g. Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 191 (9th Cir. 1983); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978). I am bound, however, to follow the most recent decisions of the Ninth Circuit. If I have not

read *Price* correctly, the Ninth Circuit can "steady" me if it finds my "step faulty." *Price*, 829 F.2d at 876.

III. DISPOSITION OF CLAIMS

I have concluded that this court has federal question jurisdiction only over Count V. The remaining four state law claims are subject only to this court's pendant jurisdiction. HAL has moved for summary judgment on all of Norris's claims on the grounds that Norris has failed to exhaust the RLA's administrative grievance procedures. I conclude that summary judgment is inappropriate since it is a ruling on the merits, and the basis for the motion is lack of jurisdiction which is more properly treated as a motion to dismiss under Fed. R. Civ. P. Rule 12(h)(3). *See Miller v. Norfolk & W.R. Co.*, 834 F.2d 556, 562 (6th Cir. 1987) (where defense is that claim was really a minor dispute subject to RLA grievance procedures, claims may be dismissed on jurisdictional grounds but cannot be decided on the merits).

I conclude, however, that the claim Norris has stated in Count V of his complaint must be dismissed for lack of jurisdiction because it is subject to the exclusive administrative grievance procedures of the collective bargaining agreement and the RLA. A collective bargaining agreement between an air carrier and its employees is subject to the provisions of the RLA, 45 U.S.C. § 181. A claim for violation of a right secured by the collective bargaining agreement is subject to RLA Section 2, First and Second, 45 U.S.C. § 152, and the grievance procedures specified in Article XV of the collective bargaining agreement and Section 204 of the RLA, 45 U.S.C. § 184. If the parties are

unable to resolve their dispute through the grievance procedures of the collective bargaining agreement, they must submit their dispute to binding arbitration. *See* Article XVI of the Agreement; *I.A.M.A. v. Republic Airlines*, 761 F.2d 1386, 1389 (9th Cir. 1985) (if dispute arising out of the interpretation of a collective bargaining agreement is not resolved through internal grievance procedures, it may be referred to adjustment board, which has exclusive jurisdiction of dispute). Courts do not have jurisdiction over employment disputes within the exclusive jurisdiction of the arbitration boards established by the RLA. *See Andrews, supra*, 406 U.S. 320 (employee claiming breach of employment agreement must avail himself of grievance procedures established by RLA); *I.A.M.A. v. Alaska Airlines, Inc.*, 813 F.2d 1038, 1039-40 (9th Cir. 1987) (federal courts have no jurisdiction to resolve disputes concerning the application or interpretation of collective bargaining agreements); *I.A.MA. v. Aloha Airlines*, 776 F.2d 812, 813 (9th Cir. 1985) (same).

In Count V Norris claims that certain acts of HAL, in particular those reflected in HAL's September 10, 1987 and September 14, 1987 letters, constitute a breach of the collective bargaining agreement. It is not disputed that Norris did not file a grievance with respect to the HAL conduct complained of in Count V or that the grievance process initiated with respect to HAL's conduct complained of in other paragraphs of the complaint was not completed. Since Norris's claim for breach of the collective bargaining agreement involves an interpretation of the terms of that agreement and is subject to the grievance and arbitration provisions of the Agreement and the

RLA, this court is without jurisdiction to entertain that claim.

Finally, I conclude that the state law claims in Counts I through IV should be remanded to state court. This court has pendant jurisdiction over these claims because they arise out of the same nucleus of operative facts. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). However, pendant jurisdiction is a doctrine of discretion, not of right, *id.* at 726, and I conclude that the state law claims should be remanded to state court rather than disposed of by this court. *Carnegie-Mellon University v. Cohill*, 108 S.Ct. 614, 622 (1987). I recognize that relevant to the exercise of discretion is whether "the allowable scope of the state claim implicates the federal doctrine of preemption," *Gibbs* at 727, and that preemption is an issue here. However, this is just one factor a court can consider when exercising its discretion. A remand, rather than dismissal, of state law claims is appropriate when it will avoid additional costs to the parties, *Carnegie-Mellon* at 9-10, and when principles of federal-state comity are involved, *id.* Moreover, "[w]hen the single federal-law claim in the action [has been] eliminated at an early stage of the litigation, [there is] a powerful reason to choose not to continue to exercise jurisdiction." *Carnegie-Mellon, id.* at 619. I conclude that these concerns dictate that the Hawaii courts decide whether Norris's state law claims may proceed despite the RLA. Those courts are perfectly capable of deciding the issue, and, indeed, have resolved a similar issue before. *See Puchert v. Agsalud*, 677 P.2d 449 (Haw. 1984) (claim of discharge in retaliation for filing workers compensation claim held not preempted by RLA).

I thus grant the motion to remand in part. I construe the motion for summary judgment as a motion to dismiss under Fed. R. Civ. P. Rule 12(h)(3) and grant the motion in part.

It is therefore ORDERED;

1) that Count V of the complaint be dismissed for lack of jurisdiction;

2) that Counts I through IV of the complaint be remanded to state court.

DATED this 24 day of March, 1988 at Anchorage, Alaska.

/s/ James M. Fitzgerald
JAMES M. FITZGERALD
United States
District Judge

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GRANT T. NORRIS, Plaintiff, vs. HAWAIIAN AIRLINES, INC., a Hawaii corporation, Defendants.	Civil No. 88-00010 HMF MEMORANDUM AND ORDER (Filed Nov. 21, 1988)

Grant Norris filed a complaint in state court stating five claims against Hawaiian Airlines ("HAL"): wrongful discharge in violation of public policy (Count I), a claim that HAL violated the Hawaii Whistleblowers' Protection Act (Count II), intentional infliction of emotional distress (Count III), a claim for punitive damages for outrageous conduct (Count IV), and a claim for breach of the collective bargaining agreement (Count V). HAL removed the case to federal court asserting federal question jurisdiction. Norris filed a motion to remand and HAL filed a combined opposition and a motion for summary judgment, arguing that the federal court had removal jurisdiction over Norris's claims because those claims were completely preempted by the Railway Labor Act (RLA), 45 U.S. C. § 151 *et seq*. HAL urged the removal preemption under the RLA was analogous to removal preemption under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and, relying on Section 301

cases, argued that this court had federal question jurisdiction. HAL then argued that the federal court lacked jurisdiction over the claims because they were subject to the exclusive arbitral remedies of the RLA.

I held that the case was initially removable because the claim for breach of the collective bargaining agreement was a federal claim arising under federal law. I dismissed that claim for lack of jurisdiction because such a claim is subject to the exclusive jurisdiction of the RLA grievance processes which had not been exhausted. As to the remaining claims, I held that "complete" or removal preemption analysis developed under Section 301 was inapplicable to claims arguably within the scope of the RLA because the RLA did not contain a civil enforcement provision such as that found in ERISA and Section 301. I relied on *Price v. PSA, Inc.*, 829 F.2d 871 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1732 (1988) which held that state law claims arguably within the scope of section 2, Fourth of the RLA were not completely preempted for purposes of removal jurisdiction because the RLA contained no civil enforcement provision. Although Norris's claims were not within section 2, Fourth of the RLA, but rather section 2, First or Second, I found *Price* applicable since section 2, First and Second also contain no civil enforcement provision. Although I recognized that HAL might have a valid federal defense to Norris's state claims (i.e. that those claims were "minor disputes" subject to the exclusive jurisdiction of the RLA grievance procedures), I held that those claims could not be recharacterized as federal claims by analogy to Section 301 and hence did not create federal jurisdiction. Although I could have exercised pendant jurisdiction over the state claims, I

exercised my discretion to remand the claims to state court.[1]

HAL moved for reconsideration arguing that I had misread *Price* since *Price* did not directly involve a collective bargaining agreement and earlier Ninth Circuit cases suggested that "complete preemption" applicable under Section 301 also applied to the RLA. HAL supplemented its motion for reconsideration after the Supreme Court decided *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877 (1988), which elucidated the proper Section 301 analysis. I scheduled oral argument on the motion and instructed the parties to assume that I agreed that I had misread *Price* and to focus their argument on *Lingle*. At oral argument, therefore, the parties assumed that a Section 301 analysis such as that in *Lingle* applies to claims governed by the RLA.

This area of the law is rather complicated because there are various concepts which are all called "preemption." In this case two preemption doctrines converge. The first is what may be called "claim preemption" or removal preemption and it governs the removability of claims from state to federal court. Under this doctrine a federal court has jurisdiction only over "state court actions that originally could have been filed in federal

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[1] If the four remaining claims are state claims then this court has pendant jurisdiction over those claims. *See United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). I have discretion to remand pendant state law claims. *Carnegie-Mellon University v. Cohill*, 108 S.Ct. 614 (1988). If, however, the four remaining claims can be "recharacterized" as federal claims, then federal question jurisdiction exists over those claims and I have no discretion to remand those claims. *See Price*, 829 F.2d at 875.

court." *Caterpillar Inc. v. Williams*, 107 S.Ct. 2425, 2429 (1987). Ordinarily a federal defense to a well-pleaded state claim does not give rise to federal question jurisdiction. *Id.* at 2430. In some cases, however, a federal statute may have such an "extraordinary" preemptive force that it converts a state claim to a federal claim providing a basis for federal subject matter jurisdiction. *Id.* Section 301 of the LMRA is such a statute. The second broad preemption doctrine involves various theories of labor law preemption, one of which may be called "forum preemption" and it governs the jurisdiction of any court to hear claims subject to the grievance and arbitration provisions of federal labor statutes such as the RLA or the NLRA. *See, e.g., San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) (if activity is arguably subject to § 7 or § 8 of the NLRA, state as well as federal courts must defer to exclusive jurisdiction of NLRB). Although the law is far from clear and cases can be found which do not seem to distinguish the jurisdictional implications of the two doctrines, I believe that "claim preemption" as developed under Section 301 does not apply in this case.[2]

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[2] Norris could not state a claim under Section 301 of the LMRA because employers who are covered by the RLA are specifically excluded from the definition of employer contained in the LMRA. *See* 29 U.S.C. § 152(2). An employee who claims that his employer has breached the collective bargaining agreement must pursue the grievance procedures created by the RLA. Neither a federal court nor a state court has jurisdiction over claims subject to the RLA grievance procedures until those procedures have been exhausted. Since Norris has no federal claim similar to a Section 301 claim I believe that preemption under the RLA is merely a federal defense which does not give rise to removal jurisdiction. *See, e.g., Caterpillar Inc. v. Williams*, 107

Thus, I do not believe that Norris's state claims can be "recharacterized" as federal claims for removal purposes pursuant to the analysis developed under Section 301. *See generally Miller v. Norfolk & Western Railway Co.*, 834 F.2d 556 (6th Cir. 1987) (discussing the various preemption doctrines applicable in RLA case and the "difficult and subtle issues" that arise and expressing doubt that Section 301 preemption doctrine applies to RLA cases); *see also Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877, 1883 n. 8 (1988) (distinguishing Section 301 preemption from other labor law preemption doctrines).

It is true that whatever state law claims Norris has may be subject to the defense that the claims are within the exclusive jurisdiction of the RLA grievance procedures. *See, e.g., Lewy v. Southern Pacific Transp. Co.*, 799 F.2d 1281, 1290 (9th Cir. 1986) (any claim that can be characterized as a "minor dispute" under the RLA is within the exclusive jurisdiction of the arbitral authority created by the RLA). However, the issue presently before this court is one of federal subject matter jurisdiction and a federal defense does not provide federal question jurisdiction. *See, e.g., Caterpillar*, 107 S.Ct. at 2432 (fact that defendant may ultimately provide that state claims are preempted by NLRB's exclusive jurisdiction does not establish that they are removable to federal court) (citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)); *see generally Franchise Tax Board v. Construction Laborers Trust*, 463 U.S. 1 (1983). Thus I concluded that this court has no federal question jurisdiction over

S.Ct. 2425, 2430 (1987) (ordinarily federal pre-emption is a defense that does not give rise to removal jurisdiction).

Norris's claims even though those claims might be subject to the federal defense of forum preemption.

HAL urges, however, that this court has federal question jurisdiction because Norris's state law claims are completely preempted by the RLA in the same manner that such claims would be completely preempted under Section 301. HAL relies on several cases which have seemingly applied "claim preemption" to RLA cases. *Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir. 1983); *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189 (9th Cir. 1983); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978); *see also Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972).[3] None of these cases, however, fully discussed or analyzed the question of removal jurisdiction in light of the recent Supreme Court cases which have elucidated the doctrine. *See, e.g., Caterpillar, Inc. v. Williams*, 107 S.Ct. 2425 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 107 S.Ct. 1542 (1987); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). The Ninth Circuit in *Price* adopted a removal analysis which incorporates these decisions and I followed *Price*. However, *Price* did not deal precisely with claims arguably within the scope of a collective bargaining agreement

[3] In *Andrews* an employee subject to the RLA filed a claim in state court for breach of contract based on a wrongful discharge. The Supreme Court held that the claim was subject to the grievance and arbitration procedures of the RLA since the source of the employee's right was the collective bargaining agreement. The basis for federal jurisdiction in *Andrews* was unclear. Nevertheless, the Supreme Court in *Andrews* relied in part on cases considering preemption under Section 301.

under the RLA and may not apply in this case. Furthermore, even if *Price* could be construed to apply in cases such as this, it may be inconsistent with the earlier Ninth Circuit decisions in *Beers, Schroeder* and *Magnuson* which found that removal of state law claims that were subject to RLA preemption was proper. Since *Price* was a pnael decision and not *en banc* I must follow *Beers, Schroeder* and *Magnuson* and determine whether Norris's claims are completely preempted for removal purposes by the RLA. *See, e.g., Antonio v. Wards Cove Packing Co., Inc.*, 768 F.2d 1120, 1132 n. 6 (9th Cir.), *withdrawn*, 787 F.2d 462 (9th Cir. 1985), *reversed*, 810 F.2d 1477 (9th Cir. 1987) (*en banc*) (panel decision is the law of the circuit until overruled by *en banc* court); *LeVick v. Skaggs Co., Inc.*, 701 F.2d 777, 778 (9th Cir., 1983) (absent *en banc* decision, prior panel decision is controlling authority for subsequent panel).

I. Claim Preemption

The parties rely on the recent Supreme Court case *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877 (1988), and several recent Ninth Circuit cases construing *Lingle. Newberry v. Pacific Racing Association*, 854 F.2d 1142 (9th Cir. 1988); *Miller v. AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988); *Hyles v. Mensing*, 849 F.2d 1213 (9th Cir. 1988). In *Lingle* the Supreme Court held that a worker's claim that she had been discharged in violation of the Illinois Workers' Compensation Act was not preempted under Section 301. The Court held that a state law claim is preempted by Section 301 only if application of state law "requires" the interpretation of a collective bargaining agreement. 108 S.Ct. at 1885. To determine whether the state law claim was preempted, the Supreme

Court first looked to the elements of the state law claim. *Id.* at 1881-82. In *Lingle* the state law tort required a showing that (1) the employee was discharged or threatened with discharge, and (2) the employer's motive in discharging or threatening to discharge was to deter the employee from exercising her rights under the Illinois Workers' Compensation Act. *Id.* at 1882. The Court concluded that the state tort claim did not require an interpretation of the collective bargaining agrement:

> Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of the collective bargaining agreement. To defend against a retaliatory discharge claim, an employer must show that it had a nonretaliatory reason for the discharge; this purely factual inquiry likewise does not turn on the meaning of any provision of a collective bargaining agreement. Thus the state law remedy in this case is 'independent' of the collective bargaining in the sense of 'independent' that matters for § 301 pre-emption purposes: resolution of the state law claim does not require construing the collective bargaining agreement.

Id. (citations omitted). The Court rejected the analysis relied on by the court of appeals and concluded that even though a state law analysis "might well involve attention to the same factual considerations as the contractual determination of whether Lingle was fired for just cause" under the terms of the collective bargaining agreement, such "parallelism" does not render the state law claim preempted by Section 301. *Id.* at 1883. The Court reemphasized that Section 301 preemption:

> merely ensures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a state may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements. In other words, even if dispute resolution pursuant to a collective bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes.

Id. (footnotes omitted). The Court also rejected any analysis that would turn on whether the state law rights were "negotiable" or "nonnegotiable" since certain "nonnegotiable" state law rights may still require interpretation of a collective bargaining agreement. *Id.* at 1882 n. 7.

The *Lingle* Court reaffirmed the approach adopted in *Allis-Chalmers Corp. v. Lueck*, 417 U.S. 202 (1985). In *Lueck* the Supreme Court held that a state law claim for bad-faith handling of an insurance claim was preempted by Section 301 when applied to the handling of a claim under a disability plan included in a collective bargaining agreement. In *Lueck* the court held that a state tort law is preempted if it:

> confers nonnegotiable state-law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract. If the state law purports to

> define the meaning of the contract relationship, that law is pre-empted.

Id. at 213. The tort in *Lueck* was preempted because "the tort exists for breach of a 'duty devolv[ed] upon the insurer by reasonable implication from the express terms of the contract,' the scope of which, crucially, is 'ascertained from a consideration of the contract itself.' " *Id.* at 216 (quoting *Hilker v. Western Automobile Ins. Co.*, 204 Wis. 1, 13-16, 235 N.W. 413, 414-15 (1931). Since the "duties imposed and rights established through the state tort . . . derive from the rights and obligations established by the contract," *id.* at 217, the state tort was preempted by Section 301.

In *Miller v. AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988) the Ninth Circuit held that an employee's state law claim alleging discrimination based on handicap, in violation of an Oregon statue protecting the physically handicapped, was not preempted by Section 301. Miller claimed that he was discharged in violation of the Oregon statute and sued his employer in state court. His employer then removed the action to federal court, asserting that Miller's claims were inextricably intertwined with the terms of the pertinent collective bargaining agreement. The court reasoned:

> If a court can uphold state rights without interpreting the terms of a [collective bargaining agreement], allowing suit based on the state rights does not undermine the purpose of section 301 preemption: guaranteeing uniform interpretation of terms in collective bargaining agreements. . . . [W]e cannot accept defendants' claim that parallel protection in collective bargaining agreements mandates preemption. . . .

> Finding preemption whenever [collective bargaining agreements] offer protections similar to those provided by state law is inappropriate because it fails to distinguish between state laws that require interpretation of the terms in a [collective bargaining agreement] and state laws that disallow all agreements to particular terms.

Id. at 545-47 (citations omitted). The Ninth Circuit found that the Oregon handicap statute as construed by the Oregon Supreme Court did not require interpretation of any terms of the collective bargaining agreement because the employee's rights under the statute were not controlled by the question of whether or not the employer acted in good faith or on reasonable grounds. *Id.* at 549. Instead, an employee's rights under the statute depended only upon a factual inquiry as to whether the employee can or cannot do the job in a satisfactory manner. *Id.*,[4] *see also Ackerman v. Western Electric Co.*, slip op. (9th Cir., November 8, 1988).

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[4] Although *Miller* was originally decided without reference to *Lingle*, in an amended opinion the Ninth Circuit stated that *Lingle* "confirms the approach we have taken in this opinion." *Miller*, slip op. at 10188 (9th Circuit, August 24, 1988).

In *Newberry v. Pacific Racing Ass'n*, 854 F.2d 1142 (9th Cir. 1988) the Ninth Circuit considered whether an employee's claims for breach of an implied covenant of good faith and fair dealing and intentional infliction of emotional distress were preempted under Section 301. Newberry had initially filed her claims in state court and the defendant had removed the action to federal court. The Ninth circuit found that Newberry's claims were preempted because her claims "require[d] [the court] to interpret the specific language of the [collective bargaining] agreement's terms. *Id.* at 1147-48.

Thus the question whether a state law claim is preempted by Section 301 depends first upon an analysis of the state law claim asserted. If an element of the state law claim is derived from or dependent upon a right or duty established by contract and the contract at issue is a collective bargaining agreement, then the state law claim will be preempted. On the other hand, if the elements of the state law claim exist independently of any contract then the state law claim will not be preempted. The fact that the collective bargaining agreement may establish similar or parallel rights does not establish preemption, nor does the fact that certain facts may be common to both an inquiry conducted pursuant to the agreement and an inquiry required by a state law analysis.

II. State Law

A. Hawaii Whistleblowers' Protection Act

Norris has claimed that HAL discharged him in violation of the Hawaii Whistleblowers' Protection Act, Haw. Rev. Stat. § 378-61 *et seq.* The Act provides:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:
>
> (1) The employee . . . reports or is about to report to a public body, verbally or in writing, a violation or suspected violation of a law or rule adopted pursuant to the law of this State, a political subdivision of this State, or the United States, unless the employee knows that the report is false; . . .

Haw. Rev. Stat. § 378-62. The Act confers a civil cause of action for violations of the Act. Haw. Rev. Stat. § 378-63. The Act also provides that it "shall not be construed to diminish or impair the rights of a person under any collective bargaining agreement." Haw. Rev. Stat. § 378-66(a). Finally, the Act States:

> Where a collective bargaining agreement provides an employee rights and remedies superior to the rights and remedies provided herein, contractual rights shall supercede [sic] and take precedence over the rights, remedies, and procedures provided in this part. Where a collective bargaining agreement provides inferior rights and remedies to those provided in this part, the provisions of this part shall supercede [sic] and take precedence over the rights, remedies, and procedures provided in the collective bargaining agreement.

Haw. Rev. Stat. § 378-66(b).

The Hawaii courts have yet to construe the scope of this Act or the nature of the cause of action conferred by the Act. However, several other states have similar acts which have been considered by the courts. Michigan, in particular, has a whistleblowers' act that is virtually identical to Hawaii's act and have been construed by the courts of that state. *See Hopkins v. City of Midland*, 404 N.W.2d 744 (Mich. App. 1987); *Tuttle v. Bloomfield Hills School Dist.*, 402 N.W.2d 54 (Mich. App. 1986). In *Hopkins* the court set forth the prima facie elements of a claim under the whistleblowers' act:

> [P]laintiff must prove: (1) that plaintiff was engaged in protected activity as defined by the act; (2) that plaintiff was subsequently not promoted [or discharged]; and (3) that a causal connection exists between the protected activity and the failure to promote [or discharge].

404 N.W.2d at 751. If the plaintiff makes out a prima facie case, the burden shifts to the defendant to show some nonretalitory reason for the discharge. *Id.* If the defendant shows a nonretalitory reason for the discharge, the plaintiff may show that the reason proferred [sic] by the defendant was only a pretext. *Id.*

None of the elements of a claim under the Whistleblowers' Act is derived from or depends upon a right conferred by a collective bargaining agreement or any other contract. The elements of a claim under the Act are, in fact, similar to the elements of the claim which the *Lingle* court found not preempted. 108 S.Ct. at 1882 (employee must show discharge and that employer's motive in discharge was to deter employee from exercising rights under Act). In this case, as in *Lingle*, the existence of a cause of action turns on the "purely factual questions pertain[ing] to the conduct of the employee and the conduct and motivation of the employer." *Id.* Moreover, to defend against a claim under the Act in this case, as in *Lingle*, the employer must show that it had a nonretaliatory reason for the discharge, a "purely factual inquiry [which] likewise does not turn on the meaning of any provision of a collective bargaining agreement. *Id.*

HAL argues that a claim under the Whistleblowers' Act is preempted because that Act "explicitly *requires* the court to interpret the rights and remedies of any applicable collective bargaining agreement" in Section 378-66(b). Third supplemental Memorandum in Support of Motion

for Reconsideration at 11. While I agree that the Act may require a court to compare the rights and remedies available to an employee under the Act with any rights and remedies available to an employee under an applicable collective bargaining agreement, I do not agree that this compels the conclusion that any claims under the Act are preempted. First, the Act makes clear that the rights and remedies it confers are independent of any similar or contrary provisions of a collective bargaining agreement.[5] An employee who states a claim under the Act may recover irrespective of any provisions of his collective bargaining agreement. Second, although an employee may be entitled to *additional relief* under a collective bargaining agreement, a collective bargaining agreement cannot *diminish* his statutory rights. Thus an employee's substantive rights *under the Act* are independent of the terms of any collective bargaining agreement. Finally, the Supreme Court in *Lingle* explicitly rejected the argument HAL advances here:

> A collective bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state law suit is entitled. . . . although federal law would govern the interpretation of the agreement to determine the

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[5] *See, e.g., Hopkins*, 404 N.W.2d at 749 (construing Michigan Act):

> [T]he act creates rights belonging to individual employees, not collectively represented groups. The substantive provisions of the act do not depend on whether an employee is subject to a collective bargaining agreement.

> proper damages, the underlying state law claim, not otherwise pre-empted, would stand. Thus, as a general proposition, a state law claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement and a separate state law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state law analysis would not be thereby pre-empted. As we said in *Allis-Chalmers Corp. v. Lueck*, 471 U.S., at 211, 105 S.Ct., at 1911, 'not every dispute . . . tangentially involving a provision of a collective-bargaining agreement is pre-empted by § 301. . . . '

108 S.Ct. at 1885 n. 12 (citations omitted). Norris's claim under the Hawaii Whistleblowers' Protection Act exists completely independently of any provisions of his collective bargaining agreement: no element in his prima facie case or in the possible defense requires or depends on any interpretation of his collective bargaining agreement. The provision of the Act ensuring that any additional rights and remedies provided in a collective bargaining agreement are not limited by the Act has no impact on Norris's substantive rights under the Act.[6]

III. Wrongful Discharge in Violation of Public Policy

Norris has also stated a claim for wrongful discharge in violation of public policy, claiming that his discharge was "in violation of the public policy expressed in the

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[6] The Michigan courts have also concluded that claims under its whistleblowers' act are independent statutory rights. *Hopkins*, 404 N.W.2d at 750; *Tuttle*, 402 N.W.2d at 56-57.

Federal Aviation Act and the Federal Aviation Regulations." Norris relies on *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625 (Hawaii 1982) in which the Hawaii Supreme Court held that "an employer may be held liable in tort where his discharge of an employee violates a clear mandate of public policy." *Id.* at 631.

HAL first argues that this claim is preempted because Norris alleges a violation of federal public policy rather than state public policy, citing *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1486 (1984). The Ninth Circuit has noted that *Olguin* was decided before *Allis-Chalmer* and is "no longer binding precedent." *Miller*, 850 F.2d at 549 (citing *Vincent v. Trend Western Technical Corp.*, 828 F.2d 563, 565-66 (9th Cir. 1987). *Olgui* is in any event distinguishable. The court in *Olguin* concluded that the plaintiff "cannot now seek protection in state law" because Arizona "has little interest in enforcing federal law." The Supreme Court of Hawaii, however, has recognized that the state tort of wrongful discharge in violation of public policy includes allegations that the discharge violated a federal policy. *Parnar*, 652 P.2d at 631 (finding the relevant public policy in the federal antitrust laws).

HAL also argues that Norris's claim is preempted because the Hawaii Supreme Court would not extend the *Parnar* remedy to an employee covered by a collective bargaining agreement. HAL notes that *Parnar* discussed the state tort as an exception to the "at-will" doctrine and thus concludes that the tort of wrongful discharge in violation of public policy applies only to "at-will" employees. Norris notes that the *Parnar* court did not explicitly limit its holding to "at-will" employees and that

some states have extended the tort to employees covered by a collective bargaining agreement. HAL counters that other states have limited the tort to "at-will" employees. I conclude that I need not resolve this issue because it involves the merits of Norris's claim and is inapposite to the only question presently before me: whether this court has federal question jurisdiction over a claim for wrongful discharge in violation of public policy. To determine this issue I must simply look to the claim alleged in the complaint and, assuming that the claim is valid, apply *Lingle* to determine whether the claim is preempted by federal law. If the claim is not preempted this court has no jurisdiction and cannot reach the merits. If the claim is preempted this court may reach the merits and determine whether the tort would apply to an employee such as Norris.

The question under *Lingle* is whether a claim for wrongful discharge in violation of public policy is a claim derived from or dependent on the terms of a collective bargaining agreement.[7] To state a claim for wrongful discharge in violation of public policy, an employee must show (1) that there is a clear mandate of public policy; and (2) that his discharge was motivated by reasons that contravene a clear mandate of public policy. *See generally Parnar*, 652 P.2d at 631-32; *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1089 (Wash. 1984) (*en banc*). Once the

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[7] HAL's argument that the state tort does not apply to employees covered by a collective bargaining agreement seems to answer this question: if the claim exists only for "at-will" employees who do not have a collective bargaining agreement, then the claim probably does not derive from or depend on the terms of a collective bargaining agreement under *Lingle*.

employee has made this threshhold [sic] showing, the burden shifts to the employer to show that the discharge was for reasons other than those alleged by the employee. *Thompson*, 685 P.2d at 1089.

This cause of action, like the cause of action in *Lingle*, does not require an interpretation of the collective bargaining agreement. The public policy is not found in the collective bargaining agreement but in "a constitutional, statutory, or regulatory provision or scheme." *Parnar* at 631. The motivation of the employer is a "purely factual" question. *Lingle*, 108 S.Ct. at 1882. To defend against the claim an employer must show that it was not motivated by a reason that contravenes public policy: "this purely factual inquiry likewise does not turn on the meaning of any provision of a collective bargaining agreement. *Id.* I therefore conclude that Norris's claim that HAL discharged him in violation of public policy is not preempted under *Lingle*. *See also, e.g., DeSoto v. Yellow Freight Systems, Inc.*, 851 F.2d 1207 (9th Cir. 1988) (reversing decision reported at 820 F.2d 1434 and holding that employee's claim that he was discharged for refusing to violate state law was not preempted under *Lingle*); *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 863 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 2819 (1988) (claim for wrongful discharge in violation of public policy not preempted by section 301).[8]

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[8] The fact that the collective bargaining agreement also provides that "[a]n employee's refusal to perform work which is in violation of established health and safety rules, or any local, state or federal health and safety law shall not warrant disciplinary action" does not mandate a finding of preemption since *Lingle* made clear that "such parallelism" between a state cause of action and rights under the collective bargaining agreement does not require a finding of preemption. 108 S.Ct. at 1883. *See also Ackerman*, slip op. at 13902.

IV. Emotional Distress

Norris asserts a claim for emotional distress, alleging that HAL's actions, "including the manner in which Norris's discharge hearing was conducted by a kangaroo court, the manner in which Norris was intimidated under pain of suspension and/or discharge to falsify aircraft maintenance records, and the manner in which Norris was threatened by the Assistant Director when the latter had been notified of Norris' report to the FAA."

In Hawaii a defendant may be liable for intentional infliction of emotional distress *if* his acts were "unreasonable," which is construed to mean "without just cause or excuse and beyond all bounds of decency" or "outrageous." *Chedester v. Stecker*, 643 P.2d 532, 535 (Hawaii 1982). The Ninth Circuit has noted that "[b]ecause the tort requires inquiry into the appropriateness of the defendant's behavior, the terms of the [collective bargaining agreement] can become relevant in evaluating whether the defendant's conduct was reasonable" since actions permitted by the agreement 'might be deemed reasonable'." *Miller*, 850 F.2d at 550. The *Miller* court concluded that in emotional distress cases independence from the collective bargaining agreement will be difficult to find. The Court noted, however, that these considerations

> do not lead to preemption of all emotional distress claims. Such claims may not be preempted if the particular offending behavior has been

> explicitly prohibited by mandatory statute or judicial decree, and the state holds violation of that rule in all circumstances sufficiently outrageous to support an emotional distress claim.

Id. at n. 5. I concluded that Norris's emotional distress claim is not preempted to the extent that it is based upon conduct that is prohibited by the Hawaii Whistleblowers' Protection Act or the tort of wrongful discharge in violation of public policy. Since I have concluded that Norris' claims against HAL based the whistleblowers' act and the state tort are not preempted, a claim for emotional distress based on the same conduct is not preempted. The Hawaii courts may determine that conduct in violation of the Act or public policy is *per se* outrageous. The conduct which forms the basis for the emotional distress claim is not controlled by the collective bargaining agreement but by independent state laws. However, Norris's emotional distress claim is preempted to the extent that it is premised on the conduct of the employer in carrying out the procedures established by the collective bargaining agreement. *See Newberry*, 854 F.2d at 1149 (emotional distress claim preempted where it was clear that claim arose out of discharge and defendant's conduct in investigation leading to discharge.

V. Punitive Damages

Norris had also stated a claim for punitive damages. The claim is based on all the factual allegations of the complaint *except* those alleged in conjunction with the claim that HAL breached the collective bargaining agreement. Complaint, Paragraph 32. I conclude that the claim for punitive damages is not preempted since it is not

premised upon conduct governed by the collective bargaining agreement but rather upon conduct which gives rise to an independent state law claim.

VI. Conclusion

I have reconsidered my previous order and conclude that even if the doctrine of "complete" or removal preemption developed under Section 301 applies to state law claims arguably within the scope of the RLA, Norris's state law claims are not "completely" preempted and hence were not properly removed to this court. I continue to believe, however, that the removal preemption doctrine articulated by the Supreme Court with respect to Section 301 suits is inapplicable to state law claims that are arguably "minor disputes" subject to the exclusive jurisdiction of the RLA grievance procedures. Preemption under the RLA, unlike "complete" preemption under Section 301, is a federal defense which does not provide a basis for federal subject matter jurisdiction.

IT IS THEREFORE ORDERED that, having reconsidered my previous order and reaching the same result, Counts I through IV of the Complaint be remanded to state court and County V be dismissed.

DATED this 16th day of November, 1988 at Anchorage, Alaska.

James M. Fitzgerald
JAMES M. FITZGERALD
United States District Judge

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